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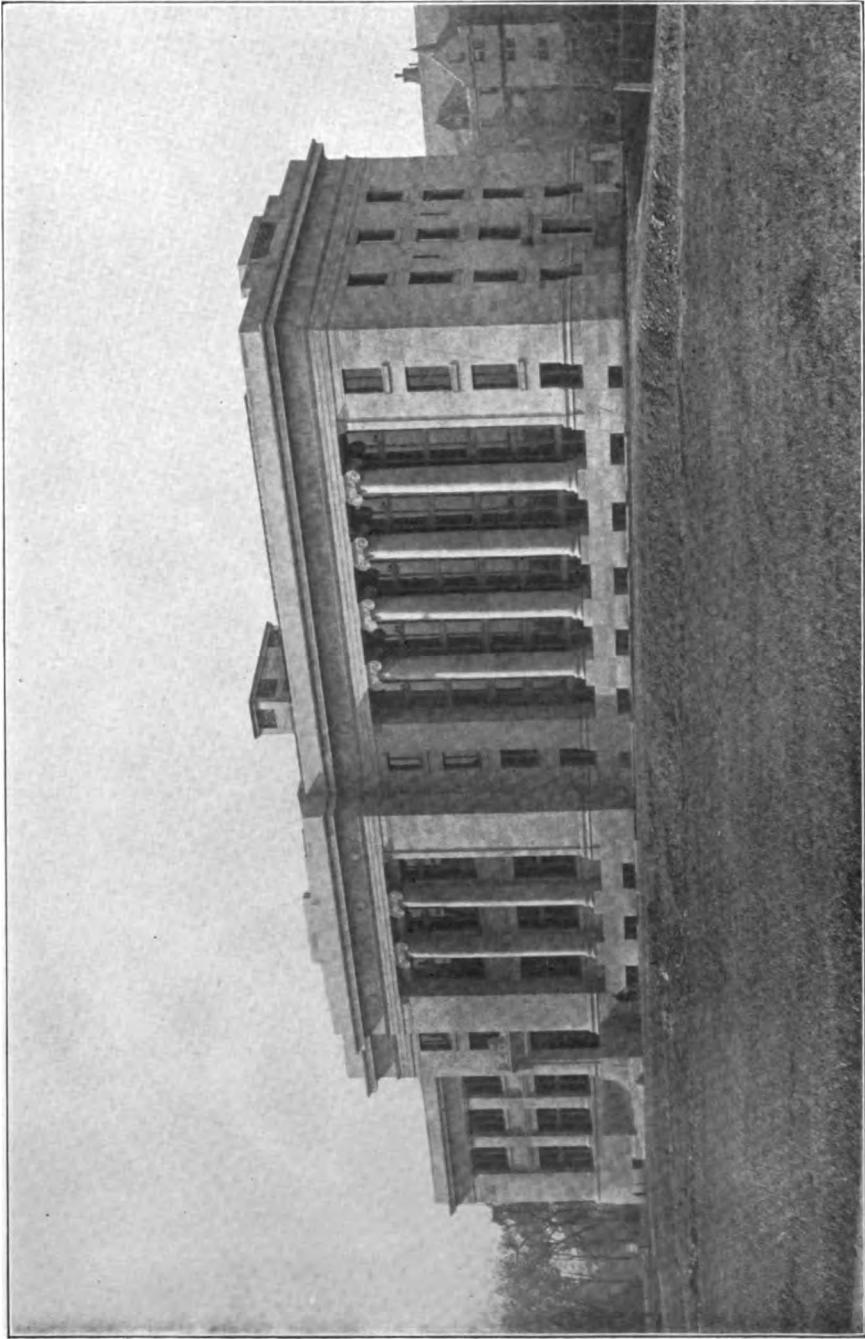
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Preface

IN a government of law rather than of men, a knowledge of the law is not only desirable but necessary for intelligent citizenship. Any increase, therefore, of the means of acquiring legal knowledge is in the direction of public service. Sociology is revealing human society as a social organism, with inter-related and mutually dependent members, governed by law in its broadest sense.

¶ The law deals with man in all his relations except those strictly social or religious. No one today can live outside the law any more than he can outside the atmosphere. As an instrument in the hands of society, the law is becoming the most potent agency in the reform of the social order.

¶ But apart from this value of the law as part of a liberal education, is the fact that a knowledge of the law may be a means of livelihood, or may be used in connection with almost every form of business. The profession of the law has always attracted the best and ablest men in the race, and its representatives fill the highest positions in State and Nation. It has long been classed among the learned professions and indeed has been clothed with a degree of mystery, and its knowledge regarded as in some way beyond the layman. We do not have to go back to the early history of Rome and the Twelve Tables for an illustration of the jealousy with which the knowledge of the law has been guarded in the past. In our own country, in early Virginia, we find that in 1682 one John Buckner was arrested for publishing the laws of Virginia, and news of his grave offense was transmitted to the king who issued an order that the thing must not occur again.

¶ Today, however, all this is changed and at least in this country the laws are not only published by private persons but

by the States, and given the largest and widest distribution. Moreover, the universal education and enlightenment of the people has made the law now an accessible and intelligible subject. No country in the world has a larger number of legally-trained men than the United States. Of this number many are engaged in the practice of the law as a profession, but perhaps a larger number are engaged in commercial and mercantile pursuits using their legal knowledge in the advancement of their business. The heads of many of the large corporations of the country today are former lawyers. All this goes to show that the law is becoming a practical branch of study.

¶ It is to meet this need and to provide ample material for legal acquisition to both the student of law and to the layman shrewd enough to appreciate the value of law in business affairs that this Library of American Law and Practice has been prepared. The different treatises composing the Library have been written by some of the ablest lawyers and law teachers in the country. In every case the effort was made, and it is believed successfully made, to secure as a writer an author of special knowledge in the subject. The writers represent men prominent in the profession and in the work of teaching law in all parts of the country, and the Library has thus been kept, as far as practicable, free from considerations of local law, the object being to give to the student a knowledge of those principles of the law prevailing in all parts of the country. Each writer has been permitted to develop his subject and to treat it substantially in his own way. No Procrustean bed has been applied to authors. If, therefore, there should be found in a particular article a topic appropriately touched upon in another article, it is hoped that such repetition will not be found unprofitable reading. It is believed that the contents of these volumes will give to students who master and digest them the elements of a sound legal education, and to the layman a safe guide in the routine of business matters wherein ordinary questions of law may enter.

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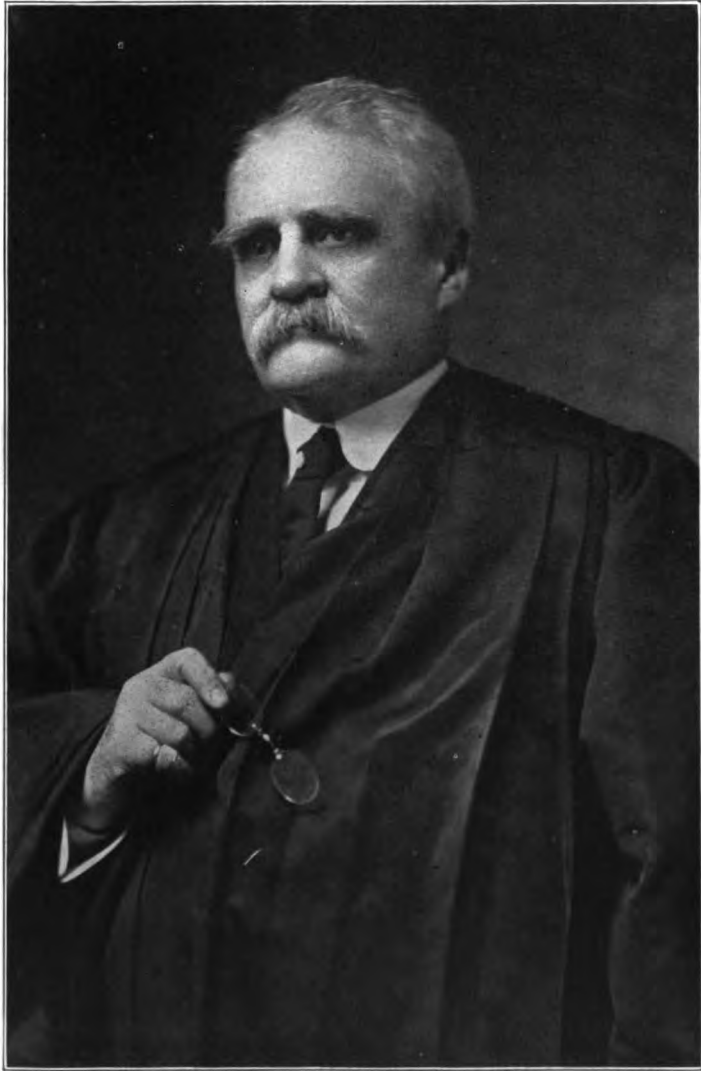
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LAW OF EVIDENCE

PART I

INTRODUCTORY

A classic definition is that "the word 'evidence' in legal acceptation, includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved."¹ The term presupposes a dispute as to matters of fact between parties to a suit. The dispute may arise from issues created by formal pleadings in law or chancery, or in the course of the trial of a cause in which no formal pleadings are required. Wherever formal pleadings are required, the matters of fact which are in dispute can only be known by an examination of such pleadings which are to be viewed in connection with the law of pleading, it being frequently the case that a pleading upon its face gives comparatively little indication of the exact matters which may be in dispute, unless reference is had to the established rules of pleading. The formal pleadings together with these rules establish the issues or matters in dispute between the parties. Evidence is the information given by the respective parties to the tribunal before which the cause is tried upon which to base its decision upon the issues or disputed matters of fact. Such information typically consists, in (a) the statements of witnesses made to such tribunal in the course of the trial as to matters of fact which they have observed by means of their senses; (b) documents produced and read in evidence after having been proven in accordance with the rules of evidence; (c) or the observations made by the tribunal as to the existence and condition of things submitted to its

¹ Greenleaf, Evidence, 15th ed., 1.

inspection. Proof is the result of evidence and evidence is the means of proof, but frequently loosely speaking the words evidence and proof are used interchangeably. Testimony consists of the statements of living witnesses and is the evidence given by such witnesses.²

By direct evidence is meant that which results in proof of the existence of facts in issue, without the intervention of inference. By circumstantial evidence is meant that which results in proof of the existence of facts which give rise to a logical inference of the existence of facts in issue.³ While the distinction between direct and circumstantial evidence has been abandoned by some writers,⁴ yet it is still of much practical importance. Thus it has been said in a case where it was sought to reverse a conviction based upon circumstantial evidence:

“Counsel for plaintiff in error make the general objections, that there is an absence of evidence relative to the *corpus delicti*, and that the evidence is purely circumstantial. ‘The proof of the charge in criminal causes involves the proof of two distinct propositions: *first*, that the act itself was done; and *secondly*, that it was done by the person charged, and by none other—in other words, proof of the *corpus delicti*, and of the identity of the prisoner.’” Here, the act done, which was to be proven, was the burning of the barn. It was also required to be proven that the barn was burned by the plaintiff in error, and that such burning was done with felonious intent, or, in the language of the statute, ‘wilfully and maliciously.’”⁵ It has been said that, in arson, the *corpus delicti* consists not only of the fact that a building has been burned, but also of the fact that it has been wilfully fired by some responsible person.⁷ The main fact, however, which is to be proven in the first place, is the burning of the building. When that fact is established, then it is necessary to show how the act was done, and by whom. We think that, in the present case, the fact that the barn was burned was clearly and satis-

² Dibble v. Dimmick, 143 N. Y. 554.

³ People v. Harris, 136 N. Y. 423.

⁴ Stephen, Dig. Evidence, Art. 1.

⁵ 3 Greenleaf, Evidence, § 30.

⁶ 1 Starr & Cur. Anno. Stat. p. 759; 3 Greenleaf, Evidence, §§ 55, 56.

⁷ Winslow v. The State, 76 Ala. 42.

factorily proven; and the circumstances were such as to exclude accident, or natural causes, as the origin of the fire. When the general fact is thus proved, a foundation is laid for the introduction of any legal and sufficient evidence, that the act was committed by the accused, and that it was done with criminal intent.⁸ Such evidence need not be direct and positive, but may be circumstantial in its character.⁹ In both criminal and civil cases, 'a verdict may well be founded on circumstances alone; and these often lead to a conclusion far more satisfactory than direct evidence can produce.'¹⁰

"After a careful examination of the evidence in this case, we are not prepared to say that the jury were not warranted in finding the verdict returned by them. Among the circumstances which may be judicially considered as leading to important and well-grounded presumptions, are 'motives to crime, declarations or acts indicative of guilty consciousness or intention, preparations for the commission of crime.'¹¹ It appears from the facts above recited, that there was evidence here which tended to show the existence of just such circumstances as are thus indicated, revenge for arrest and imprisonment, threats that the barns would be burned, halting on the way to obtain matches. The evidence of the footprints and their correspondence with the defendant's feet was competent, and, though 'not by itself of any independent strength, is admissible with other proof as tending to make a case.'¹² In *Winslow v. The State*, *supra*, where the indictment was for arson, and 'there was evidence tending to show a fresh track in the lane leading from the road to the house; (and) that this track, and the track of the defendant corresponded,' it was said: 'The previous threats of the defendant, and his declarations in the nature of threats were, on the same principle, properly admitted. While they are not of themselves convincing of guilt, from them, in connection with the other circumstances, if believed by the jury, guilt may be a logical sequence.'¹³

Where objects are brought before the tribunal for its

⁸ *Sam. v. The State*, 33 Miss. 347; *Phillips v. The State*, 29 Ga. 105.

⁹ *Winslow v. The State*, *supra*, footnote 7.

¹⁰ 1 Greenleaf, Evidence, § 13a.

¹¹ *Pease v. Burrowe*, 86 Me. 153.

¹² *Wharton's Crim. Evidence*, (8th ed.) § 796.

¹³ *Wharton's Crim. Evidence*, (8th ed.) § 756; *Carlton v. People*, 150 Ill. 186.

inspection or it visits and inspects them, such objects are said to constitute real evidence, being addressed directly to the senses of the tribunal.

By competent evidence is meant "that which the very nature of the thing to be proved requires".¹⁴ A more satisfactory definition is that competent evidence is that which is not excluded by any rule of law relating either to the nature of the evidence or to the witness whose testimony is offered as a part or the whole of such evidence. Cumulative evidence is additional evidence of the same kind as that previously introduced upon the same issue.¹⁵ In reference to the production of evidence it has been said by Greenleaf:

"The production of evidence to the jury is governed by certain principles, which may be treated under four general heads or rules. The *first* of these is, that the evidence must correspond with the *allegations*, and be confined to the point in issue. The *second* is, that it is sufficient if the *substance* only of the issue be proved. The *third* is, that the burden of proving a proposition, or issue, lies on the party holding the affirmative. And the *fourth* is, that the best evidence of which the case, in its nature, is susceptible, must always be produced."¹⁶

The rule that the evidence must correspond with the allegations, refers to the allegations of the pleadings of the respective parties in the suit and as noted above means those allegations as amplified or restricted by the rules of the law of pleading. By the substance of the issue is meant, under modern decisions, that the issue must be proved substantially but that literal proof is not necessarily required. The question is usually one of variance and the statutes permitting amendments and decisions thereunder should be consulted, the general modern tendency being to allow amendments to cure variances within the discretion of the trial court, which in practice is quite freely exercised.

The term "best evidence" has been supposed by some to

¹⁴ Greenleaf, Evidence, § 1.

¹⁶ Greenleaf, Evidence, § 50.

¹⁵ Hines v. Driver, 103 Ind. 328.

belong properly to documentary evidence exclusively,¹⁷ but in modern practice in this country, whenever any evidence when produced shows upon its face that there is an offer of an inferior for a higher grade of evidence, the inferior will upon objection at once be rejected until the production of the better evidence is excused under some of the rules of evidence. Thus the offer of a copy of an instrument at once shows the existence of an original, the production of which must be excused. Apart from documents it is difficult to lay down any general rules except that the term relates to the quality of the evidence rather than to its strength.¹⁸

The general principle, "that courts are not at liberty to infer from one fact the probable existence or non-existence of another fact merely because the two are similar, unless they can be first shown to be part of the same transaction, or to be connected together in some way by the chain of cause and effect, is one of the most distinguishing characteristics of the English law of evidence. It stands in marked contrast with the practice which prevails among some of the continental nations of Europe, where in criminal cases it is customary for the prosecution to collect and set out before the tribunal before which the case is tried, a detailed history of the entire previous life of the accused, in order that it may judge therefrom of the probability of his having been guilty of the offense with which he is charged."¹⁹

The most important class of evidence being the testimony of persons appearing before the tribunal, the first subject treated in this discussion will be Witnesses; and this will be followed by Documentary Evidence and Real Evidence. There will then be treated certain classes of cases in which the Production of Evidence is excused, including the subjects of Judicial Notice, Presumptions, and Burden of Proof, and in conclusion will be given a brief discussion of the Art of Introducing Evidence.

¹⁷ Thayer, Preliminary Treatise on Evidence, p. 497.

¹⁸ Jones, Evidence, § 199.

¹⁹ Reynolds, Evidence, § 12.

CHAPTER I

WITNESSES

COMPETENCY

§ 1. **Parties and Persons in Interest.** The common law in respect to the competency of witnesses has been much changed by statute in every jurisdiction.¹ At the common law parties to a suit and persons interested in the result thereof were not allowed to testify upon the trial, and the rule was so stringent that the parties could not be compelled to testify even upon the motion of an adversary. By statute this disqualification of parties and persons in interest has been removed, but with the very important qualification that a party or person in interest is not permitted to testify of his own motion where the opposite party is defending in such case in a representative capacity as that of executor or administrator, heir, or devisee, of a deceased person in respect to matters arising before the death of the person whose estate is thus represented. The statutes removing the original common-law disqualification and creating the exceptions of which the above mentioned is probably the most important, vary in details and must be consulted for exact information. That in force in Illinois is typical, and provides:

“That no person shall be disqualified as a witness in any civil action, suit, or proceeding, except as hereinafter stated, by reason of his or her interest in the event thereof, as a party or otherwise, or by reason of his or her conviction of any crime; but such interest or conviction may be shown for the purpose of affecting the credibility of such witness; and the fact of such conviction may be proven like any fact not of record, either by the witness himself (who shall be compelled to testify thereto) or by any other witness cognizant of such conviction as impeaching testi-

¹ 26 Am. Law Rev. 821.

mony, or any other competent evidence. No party to any civil action, suit, or proceeding, or person directly interested in the event thereof, shall be allowed to testify thereof of his own motion, or in his own behalf, by virtue of the foregoing . . . when any adverse party sues or defends as the trustee or conservator of any idiot, habitual drunkard, lunatic, or distracted person, or as the executor, administrator, heir, legatee, or devisee of any deceased person, or as guardian or trustee of any such heir, legatee, or devisee, unless when called as a witness by such adverse party so suing or defending.”

This is followed by minor detailed exceptions and a provision for compelling adverse parties to testify.²

In respect to criminal cases the provision of the Illinois Statutes is as follows:

“No person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility; Provided, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect.”³

The reasoning which lies at the basis of the present exception as to parties and persons in interest in civil cases has been said to be that “if death has closed the lips of one party, the policy of the law is to close the lips of the others.”⁴

The interest which disqualifies a witness at common law in a civil suit was required to be of a pecuniary nature, present, certain, and vested, and the same tests will now be applied when the suit is by or against an executor, or other person within the exceptions of the statutes. Thus in a suit by an administrator to recover for the death of his

² Hurd's Ill. Stats. 1908, p. 1958.

⁴ *Louis v. Easton*, 50 Ala. 471.

³ Hurd's Ill. Stats., 1908, p. 786.

decedent against a corporation, a stockholder of the corporation has such an interest as will disqualify him under the modern statutes, the value of his stock being increased or diminished by the judgment.⁵ Whenever a person would lose or gain by the effect of the judgment to be rendered, or where such a judgment would as a matter of substantive law be binding upon him in a future suit, then he has an interest in the sense in which this term is used. For example, in a suit by an administrator to recover against a street railway company for the death of his decedent, it was held that the motorman who was in charge of the car of the defendant which caused the death complained of was a competent witness against the administrator, unless he had been notified by the defendant to appear and defend in its behalf. Apart from any such notice to appear and defend the interest of the motorman was held not such as to disqualify him as he would not lose or gain by the judgment; and it could not be used as evidence against him or be binding upon him unless he was notified to appear and defend. Merely being a servant of the defendant at the time of the accident in question did not give him such an interest as to disqualify him.⁶ No attempt will be made to state rules which are applicable under the decisions upon the statutes of the various States. The statutes themselves must be consulted for detailed information.

§ 2. Prior Conviction. At the common law persons who had been convicted of infamous crimes or of the *crimen falsi* were not permitted to be witnesses. By the *crimen falsi* was meant an offense which “not only involves the charge of falsehood, but also is one which may injuriously affect the administration of justice by the introduction of falsehood and fraud.”⁷ This disqualification has generally been removed by statute, leaving the party against whom such a witness is produced the privilege of showing such

⁵ Albers Commission Co. v. Sessel, Exr., 193 Ill. 155.

⁶ Feitl, Admx. v. Chicago City Railway Co., 211 Ill. 284.

⁷ 1 Greenleaf, Evidence, § 673.

conviction upon the question of the credibility of the witness, as impeaching evidence.

§ 3. Mental Incapacity. Those lacking mental capacity because of idiocy, insanity, or extreme youth, or for any other reason, are not competent witnesses. The basis of this disqualification is the inability of the person to appreciate the solemnity of the oath administered as a prerequisite of his testimony and his lack of capacity to make correct observations and to narrate faithfully the result of such observations. In each case there is presented a preliminary inquiry as to mental capacity to be made by the court whenever such capacity is questioned.⁸ At the age of fourteen every person is presumed to be competent.⁹ Under that age if any question is made, capacity is to be determined by the court.¹⁰ It is customary when producing infants of tender years as witnesses to attempt to show such capacity by preliminary questions before proceeding to the matters in issue and before any objection is made to the witness. Persons of unsound mind may testify if the court finds their understanding sufficient.¹¹

§ 4. Husband and Wife. At the common law husband and wife were incompetent to testify for or against each other when one was a party to a suit.¹² To this there were some well-recognized exceptions, such as cases involving an offense committed by one against the other. The common-law rule still remains quite generally in force, the number of exceptions having been usually amplified by statutes which differ and must be consulted to obtain the exact status of the law on this subject. A statute which is typical is that of Illinois, which is as follows:

“No husband or wife shall, by virtue of section 1 of this act, be rendered competent to testify for or against each other as to any transaction or conversation occurring during the marriage, whether called as a witness during the

⁸ *Holcomb v. Holcomb*, 28 Conn. 179.

⁹ 16 Am. & Eng. Encyc. Law, (2nd ed.), 267.

¹⁰ *Commonwealth v. Robinson*, 165 Mass. 426.

¹¹ *Pease v. Burrowes*, 86 Me. 153.

¹² *Keep v. Griggs*, 12 Ill. App. 511.

existence of the marriage, or after its dissolution, except in cases where the wife would, if unmarried, be plaintiff or defendant, or where the cause of action grows out of the neglect of the husband to furnish the wife with a suitable support; and except in cases where the litigation shall be concerning the separate property of the wife, and suits for divorce; and except also in actions upon policies of insurance of property, so far as relates to the amount and value of the property alleged to be injured or destroyed, or in actions against carriers, so far as relates to the loss of property and the amount and value thereof, or in all matters of business transactions where the transaction was had and conducted by such married woman as the agent of her husband, in all of which cases the husband and wife may testify for or against each other, in the same manner as other parties may, under the provisions of this act: Provided, that nothing in this section contained shall be construed to authorize or permit any such husband or wife to testify to any admissions or conversations of the other, whether made by him to her or by her to him, or by either to third persons, except in suits or causes between such husband and wife."¹³

The theory of this common-law disqualification has been variously stated as the "civil unity" of the persons of husband and wife; the danger of "disturbing the peace of families" and natural repugnance to compel one spouse to be the means of the condemnation of the other.¹⁴ The marriage must be a valid one in order to give rise to the privilege. Thus in an alleged bigamous marriage, it has been held that the second wife may be called as a witness but not the first where the first marriage is not disputed or has been proved by other evidence.¹⁵

§ 5. Lack of Religious Belief. The common-law disqualification of witnesses who lacked religious belief has in this country generally been removed either by constitutional provisions or by statute. In the absence of such provisions or enactment, the witness is absolutely disqualified by a showing that he has no religious belief.¹⁶

¹³ Hurd's Ill. Stats. (1908), p. 1059.

¹⁴ Wigmore, Evidence, § 2227, *et seq.*

¹⁵ Miles v. U. S. 103, U. S. 313.

¹⁶ Hronek v. People, 134 Ill. 149; Curtiss v. Strong, 4 Day 51.

PRIVILEGED COMMUNICATIONS

Even though a witness is competent yet upon grounds of public policy there are certain matters upon which he will not be permitted to testify, the private interests of the parties to a suit being subservient to those of the public to be conserved by keeping such matters secret. Such privileged communications have been classified as political, judicial, social, and professional.

§ 6. Political Communications. The transactions and communications of government officials involving what are known as state secrets are obviously within the rules of public policy above stated.¹⁷ Also under this head may be included communications to government officers whose duties are to prevent and punish wrongs.¹⁸

§ 7. Judicial Communications. The conferences of judges, petit jurors, grand jurors, and arbitrators, in reaching their decisions are privileged. A judge may testify as to matters which took place at a trial before him. Petit jurors may testify as to matters which occurred in the jury room and tend to support their verdict, but not to impeach it, as otherwise all verdicts would be insecure. They are competent as to what took place in open court upon the trial. A grand juror may testify as to the evidence given by a witness before such jury where the witness is accused of perjury on account of such testimony and possibly in support of an indictment, but not to impeach it. The rule for arbitrators is substantially the same as for petit jurors.

§ 8. Social Communications. Upon principles of public policy communications between husband and wife intended by them to be confidential are privileged, and in a few jurisdictions the privilege is extended to all information obtained by a spouse through the marital relation. This must not be confused with the rule that husband and wife were at common law incompetent as witnesses for or against each other. That rule excluded certain persons as

¹⁷ *Marbury v. Madison*, 1 Cranch. 137.

¹⁸ *Vogel v. Gruaz*, 110 U. S. 311.

witnesses while this excludes certain communications on grounds of public policy.

§ 9. Professional Communications. Conferences between attorney and client, when held in such a way as to be confidential, are in all jurisdictions privileged, but such privilege may be waived by the client though not by the attorney. Otherwise the administration of justice could not go on, it being of the highest public importance that every person should feel free to consult his legal adviser. So long as the communication bears the marks of having been made with the purpose, express or implied, of seeking advice from an attorney confidentially, it will be held privileged regardless of whether litigation was pending at the time or of whether there has been a retainer or the payment of a fee.¹⁹ The privilege does not, however, extend to communications made in the presence of third persons,²⁰ so as not to be confidential in the manner of being made. On the other hand, it is not necessary that the person seeking advice should expressly enjoin secrecy on the part of the attorney. The law does that and when it appears that such a communication is about to be divulged the court will not await the interposition of an objection, but will act of its own motion to exclude the evidence.²¹ It has been held that statements made with a person erroneously supposed to be an attorney by the person consulting him are not privileged.²² It would seem, however, that the better rule is that such a consultation made in good faith should be protected by the privilege.²³ The rule of course extends to documents involved in such communications or forming a part thereof, and to communications made to necessary or convenient agents or assistants of the attorney, all such communications being privileged. An attorney is not disqualified to act as a witness for his client upon such matters

¹⁹ *Alexander v. U. S.*, 138 U. S. 353.

²⁰ *People v. Buchanan*, 145 N. Y. 1.

²¹ *Hodges v. Mullikin*, 1 Bland 505.

²² *Sample v. Frost*, 10 Iowa 266.

²³ *Benedict v. State*, 44 Ohio Stat. 679.

as are not privileged or upon those which are privileged, provided the privilege is waived by the client,²⁴ but from the fact that he is essentially the advocate of his client's cause his testimony is subject to scrutiny on that account, and as soon as it becomes known that such testimony will be necessary to protect his client's interest he should withdraw from the employment.

Communications between physician and patient, and between clergyman and penitent or parishioner, are not privileged at common law,²⁵ but by statutes of somewhat varying terms, such privilege exists in about one-half the jurisdictions of the United States. Where it does not exist it is thought that the courts are reluctant to compel such testimony unless strictly necessary to prevent a failure of justice. The statutory provisions were first enacted in New York and the legislation of that State is typical. In respect to physicians it provides as follows:

"A person duly authorized to practice physic or surgery shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity."²⁶

The provision in reference to clergymen is as follows:

"A clergyman or other minister of religion shall not be allowed to disclose a confession made to him in his professional character in the course of discipline, enjoined by the church to which he belongs, without the consent of the person making the confession."²⁷

The statutes are for the protection of persons consulting physicians or clergymen in a professional capacity and generally provide that the privilege may be waived by the person for whose benefit it exists.²⁸

²⁴ *Hunt v. Blackburn*, 128 U. S. 464.

²⁵ *Greenleaf, Evidence*, §§ 240-248, (15th ed.)

²⁶ N. Y. C. C. P. § 834, (1877).

²⁷ N. Y. C. C. P. § 833, (1877).

²⁸ *Morris v. New York Co.*, 118 N. Y. 77.

WITNESSES IN COURT

§ 10. **Attendance of Witnesses.** The attendance of witnesses is enforced by a writ known as a *subpœna* issuing from the court in which the trial is had. Such writs are of two kinds, the *subpœna ad testificandum*, which simply commands the attendance of the witness, and the *subpœna duces tecum*, which not only commands the attendance of the witness but enjoins him to bring with him certain documents described in the writ. The *subpœna ad testificandum* is issued by the clerk of the court as a matter of course, while at least in some jurisdictions the *subpœna duces tecum* issues only upon order of court and upon a showing as to the materiality and necessity of the documents to be produced. In respect to this Marshall, C. J., said in the case of *U. S. v. Burr*:

"The court can perceive no legal objection to issuing a *subpœna duces tecum* to any person whatever, provided the case be such as to justify the process. This is said to be a motion to the discretion of the court. This is true. But a motion to its discretion is not a motion to its inclination but to its judgment; and its judgment is to be guided by sound legal principles. A *subpœna duces tecum* varies from an ordinary *subpœna* only in this: that a witness is summoned for the purpose of bringing with him a paper in his custody. In some of our sister States, whose system of jurisprudence is erected on the same foundation with our own this process we learn issues of course. In this State (Virginia) it issues not absolutely of course, but with leave of the court. No case, however, exists, as is believed, in which the motion has been founded on an affidavit in which it has been denied or in which it has been opposed."²⁹

In more recent cases it has been quite frequently held that a preliminary showing and an order of court are necessary for the issuance of a *subpœna duces tecum*.³⁰

²⁹ *U. S. v. Burr*, 25 Fed. Cas. 30.

³⁰ *Dancel v. Goodyear Shoe Mach. Co.* 128 Fed. 753; *Bentley v. People*, 104 Ill. App. 353; 107 Ill. App. 247; *Weber v. Clerk*, 108 Ill. App. 287; *Consolidated Coal Co. v. Jones & Adams Co.* 120 Ill. App. 141; *Trimble v. Mulhollen*, 8 Pa. Dist. 441; *U. S. v. Hunter*, 15 Fed. 712; *Duke v. Brown*, 18 Ind. 3; *Sharp v. Page*, 66 Ark. 232; *U. S. v. Babcock*, 3 Dill, 566; *Ex parte Brown*, 72 Mo. 83.

Whether these decisions are based upon common law or by analogy with statutes requiring a showing to be made as a preliminary to an order requiring production of documents by a party to a suit, the fact remains that in a number of jurisdictions the *subpoena duces tecum* does not issue as a matter of course. When improperly issued without a showing the question may be raised upon a motion to quash the writ so far as it relates to the production of documents.³¹

§ 11. **Depositions.** If the witness is beyond the jurisdiction of the court so that he cannot be reached by its compulsory process, provision is made for taking his testimony before a commissioner resident at the place where the witness is located, upon a writ called a *dedimus potestatem* or commission issuing from the court in which the issues are pending, and directed to and authorizing such commissioner to propound or supervise the propounding of interrogatories to the witness. The deposition may be taken upon written interrogatories forwarded with the commission, together with any cross interrogatories filed by the opposing party. In such a case the commissioner propounds the interrogatories and records the answers, which are then read over by the witness, who subscribes and swears to them. At such an examination usually neither of the parties nor their agents or attorneys are permitted to be present. Or the deposition may be taken upon oral interrogatories and cross interrogatories propounded to the witness by the respective parties or their attorneys, in which case the commissioner records the interrogatories and cross interrogatories and the answers and has them subscribed and sworn to by the witness. In either case he has no authority to make any ruling as to the admissibility of the evidence, objections to which, and to the commissioner's return if upon matters of form, must be by motion to suppress the deposition made in the court in which the issues are pending. This motion must be made promptly upon the return of the deposition as to

³¹ U. S. v. Hunter, 15 Fed. 712.

all matters which could be cured by retaking the deposition. As to other matters objection may be reserved and made at the time the deposition is offered upon the trial. The attendance of the witness in the foreign jurisdiction is procured by such *subpœnas* or writs as are authorized by the law of such jurisdiction. In some jurisdictions it is impossible to enforce the attendance of witnesses before commissioners appointed by courts of other States. Provisions are usually made for taking the depositions of resident witnesses who are ill, or about to depart from the State before the trial, or who reside within the State but at a considerable distance from the place of trial. The rules in such cases are not different from those outlined above. The constitutional provisions requiring the confrontation of the defendant in a criminal case with the witnesses against him at the trial prevent the taking of depositions on behalf of the prosecution in such cases.

§ 12. Bills in Equity for Discovery. At the common law, not only was a party to a suit incompetent to testify as a witness at the trial thereof, but could not compel the opposite party to testify. On account of this equity took jurisdiction of bills framed for the sole purpose of procuring for a party to an action at law evidence possessed by his opponent. The defendant to the bill for discovery in equity was compelled to answer under oath the interrogatories propounded by the complainant in his bill, provided they were material and relevant under the pleadings in the action at law and did not come within any privilege against self incrimination or the like. The complainant was then permitted to use the answers as evidence in the action at law. Bills of discovery are still used, but under modern statutes permitting a party to a suit to call his opponent as a witness, their use is as a matter of practice limited to a few special cases or completely abandoned. If in the answer to a bill of discovery it appeared that the defendant was in the possession of documents material and relevant under the complainant's pleadings in his action at law, the chancellor would compel their production. The modern

Evidence Acts provide for compelling production of documents held by the opposing party by a summary proceeding, as by motion and showing by affidavit of materiality and necessity for production, or by *subpoena duces tecum* directed to such opposing party, and this at one time quite important function of the bill for discovery has thus been to a great extent superseded.³²

§ 13. The Oath. Before giving his testimony the witness is either sworn or as a substitute therefor affirms that he will tell the truth in a manner prescribed by the practice in the jurisdiction. The manner of administering the oath may be that of the common law upon the Bible or with uplifted hand, but the parties to the suit are entitled to have any form of oath administered which appears to be most binding upon the conscience of the witness. Thus it has been said:

“Jews may be sworn on the Pentateuch with covered head; Mahometans, upon the Koran; Gentoos, by touching the foot of a Brahmin; Chinese, by the ceremony of killing a cock, or breaking a saucer, the witness declaring that if he speaks false, his soul will be similarly dealt with; a Scotch Covenanter and a member of the Scottish kirk, by holding up the hand without kissing the book; Quakers and others, who profess to entertain conscientious scruples against taking an oath in the usual form, are allowed an affirmation, that is, a solemn religious asseveration that their testimony shall be true. A wilful false oath under such circumstances is perjury.”³³

The subject of the disqualification of witnesses who lack any religious belief has already been referred to in Section 5.

§ 14. Examination of Witnesses. Upon being sworn the party calling the witness proceeds to interrogate him. This is known as the direct examination and the witness being presumed to be favorable to the party calling him, leading or suggestive questions are not permitted except as to pre-

³² *Swedish American Telephone Company v. Fidelity & Casualty Co. of New York*, 208 Ill. 575.

³³ *Rapalje, Witnesses*, § 235.

liminary matters not in dispute, unless the witness shows himself hostile or lacks intelligence, or a suggestive question is necessary to refresh the memory of the witness, in which cases the questions of hostility and necessity are for the court upon objection made by the opposite party. By a leading question is meant one which suggests a desired answer, or assumes or suggests the existence of matters which are in issue and not yet proven. The attention of the witness must be directed to such matters without assuming their existence or suggesting the desired answer. A question may frequently be made colorless and suggestion avoided by introducing it by or embodying in it the phrase "whether or not". A leading question may always be asked when it appears that the witness is hostile or even reluctant to testify, and objection that the question is leading will always be overruled when such hostility or reluctance appears.

When the direct examination has been completed the opposing party may examine the witness, in most jurisdictions in this country only upon matters brought out upon the direct examination, and in others, upon anything material to the issues being tried. This is known as the cross-examination and leading questions may be asked, the witness being supposedly unfriendly. The rule has been stated by Mr. Jones as follows:

"According to the English rule where a witness is called to a particular fact, he becomes a witness for all purposes and may be fully cross-examined upon all matters material to the issue, the examination not being confined to the matters inquired about in the direct examination. The same rule has been followed in some jurisdictions within the United States. But the rule which was long ago declared by the Supreme Court of the United States, called the American rule, is quite different. The cross-examination can only relate to facts and circumstances connected with the matters stated in the direct examination of the witness. If a party wishes to examine a witness as to other matters, he must do so by making the witness his own."²⁴

²⁴ Jones, Evidence, § 820.

By making the witness his own is meant that the party doing so calls such witness when putting in his own case. Upon the completion of the cross-examination the party producing the witness may examine him further upon any new matter brought out upon the cross-examination. This is known as the re-direct examination, and is subject to the same rules as the direct examination in reference to leading question. Both the examination and the cross-examination of the same witness must be conducted by a single attorney for the respective parties, unless leave of court be obtained to depart from the rule which lies somewhat in the discretion of the trial judge. Questions designed to elicit the facts in issue may always be asked by the judge in any form, and in criminal cases he may be asked to call and examine a witness who is supposedly familiar with the facts but by whose testimony the party making the request does not desire to be bound.

Privilege against Self Crimination—Objection by the Witness. Constitutional provisions and statutes in the various jurisdictions of the United States give to every witness a general privilege against testifying as to matters which would tend to incriminate him.³⁵ These provisions are declaratory of principles recognized and enforced by rules of the common law. The privilege may be waived by a failure of the witness to claim it, and if he desires to avail himself of such privilege he must object upon this ground, to answering the questions which have the supposed criminating tendency.³⁶ The question is then one for the court for decision upon the sworn statement of the witness that the answer to the question will criminate and the general circumstances of the case.³⁷ It is not necessary that the witness should state in making objection the details of how he will be incriminated by the answer,³⁸ and if compelled to give it such answer cannot afterwards be

³⁵ *Marbury v. Madison*, 1 Cranch 144.

³⁶ *Samuel v. People*, 164 Ill. 379.

³⁷ *Bull v. Loveland*, 10 Pickering 9.

³⁸ *Janvrin v. Scammon*, 29 N. H. 280.

used in evidence against him, being regarded as obtained by duress. This, however, is very insufficient protection, as it may show sources of information which may be used for purposes of obtaining a conviction. The rules applicable have been laid down as follows:

“He (the witness) may not only refuse to answer as to the crime itself, but as to any circumstance or any link in the chain of proof from which the crime may be inferred. Said Lord Tenterden: ‘You cannot only not compel a witness to answer that which will criminate him, but that which tends to criminate him; and the reason is that the party would go from one question to another, and though no question might be asked, the answer of which would directly criminate the witness, yet they would get enough from him whereon to found a charge against him.’ It follows that it is not necessary in order to claim the privilege ‘that the answer unconnected with other testimony should be sufficient to convict him of crime.’ It is not the rule, however, that the privilege must always be extended to the witness if asked. While the court should be extremely careful to protect the witness in this right, yet the danger must be something more than a merely fanciful or imaginary danger. It must be real, with reference to the probable operation of law in the ordinary course of things, and not merely speculative, having reference to some remote and unlucky contingency. The court must see, from the circumstances of the case and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer, and that it would naturally subject him to actual punishment.”³⁹

If the answer cannot be used against the witness the reason for the general rule of course fails to exist and the witness may be compelled to answer. Many modern statutes contain immunity clauses which practically operate as an amnesty or pardon to witnesses who testify in prosecutions under such statutes. Such provisions are likely to be found in all recent anti-trust Acts and grew out of the difficulty in prosecuting such cases without using the tes-

³⁹ Jones, Evidence, § 885.

timony of at least some persons who had participated in the alleged infraction of law.⁴⁰

The same privilege as that against self-incrimination has been accorded to witnesses where their testimony would result in a forfeiture or penalty,⁴¹ but not in cases where the result would simply be a civil suit and possible or probable resulting judgment debt.⁴²

Objections and Exceptions. If counsel for a party against whom evidence is offered considers that for any reason a question asked calls for an answer which is inadmissible, it is his duty to object to the question before it is answered. If the ground of inadmissibility first appears in the answer, that must be objected to and motion made to strike it out. A general objection that a question or answer calls for or contains matter which is "incompetent, irrelevant, and immaterial" is not sufficient if the evidence is admissible for any purpose. The objection or motion to strike out must contain the specific grounds relied upon and usually a court of review will consider no other grounds than those which are thus urged, it being considered that other grounds are waived by not presenting or urging them in the objection. In a trial in a court of common law it is also necessary to except to each unfavorable ruling of the court upon the admission or rejection of evidence at the time such ruling is made. The objections and exceptions are then preserved for review by a bill of exceptions signed and sealed by the trial judge either at the time of the trial, or later according to the practice of the court. In some courts under special statutes, as for instance, in the Municipal Court of Chicago, exceptions are not necessary. In trials in courts of equity objections must be made, but exceptions are not necessary, and there is no such thing as a bill of exceptions. In ancient equity practice, all evidence was taken by deposition in the absence of the parties and of course no objec-

⁴⁰ *Interstate Commerce Commission v. Baird*, 194 U. S. 25.

⁴¹ *Boyd v. United States*, 116 U. S. 616.

⁴² *Jones, Evidence*, § 892.

tions were possible until the depositions were opened or published. In modern practice objections must be made as at common law and where evidence is heard in open court the objections must be embodied in a certificate of evidence signed and sealed by the trial judge.⁴³

Offers of Testimony. Offers of testimony must be made by calling a witness to the stand and interrogating him. If objections are sustained to the questions asked, the procedure may be shortened by offering to prove by the witness certain matters stated in the offer. If no objection is made to the offer or objection to it is overruled, questions are then asked designed to bring out the matters contained in the offer. If objections to the offer are sustained, an exception is taken and the witness is not interrogated further upon the matters contained in the offer. Such offers must be made in a formal way and the witness by whom the proof is to be made must at least be present in the court room. Upon this question it was said in a recent case:

“Appellant in fact offered no evidence upon the matter. No witness was put upon the stand; no question was asked. Nothing was done except at a mere conversation or talk had between counsel for appellant and the court. Such procedure as that does not amount to an offer of evidence, and the remarks of the court did not amount to a refusal to admit evidence. There can be no refusal to admit that which has not been offered, and counsel cannot by engaging in a mere conversation with the court, although it may relate to the procedure, by merely stating what he desires to do, get a ruling from the court upon which he can predicate error. If appellant desired to make the contention it now makes, it should at least have put a witness upon the stand and proceeded far enough that the question relative to the point it is now said it was desired to offer evidence upon was reached, and then put the question and allow the court to rule upon it, and then offer what was expected to be proved by the witness, if he was not allowed to answer the questions asked.”⁴⁴

⁴³ Hurd's Rev. Stat. Ill. (1909).

⁴⁴ Chicago City Ry. Co. v. Carroll, 206 Ill. 327.

Interpreters. The proceedings of courts in the United States are usually required to be in the English language. In case a witness is unable to speak English an interpreter may be called to translate the questions and answers, and such interpreter is while acting in that capacity an officer of the court. The necessity for using an interpreter is a preliminary question for the court upon the ability of the witness to testify intelligently in the English language.⁴⁵

Refreshing the Memory of the Witness. Especially under modern conditions the question of refreshing the memory of a witness upon questions of detail has become of very great importance. This is most commonly done by presenting to the witness a paper for inspection. If upon looking at the paper the witness is able to say that he has an independent present recollection of the matters upon which he is interrogated, then he is permitted to testify upon such matters independently of such paper, which is not offered in evidence. The purpose of the paper being only to stimulate a present recollection, it is theoretically a matter of indifference when or by whom it was made, or whether it is an original or a copy. It may be untrue and the testimony of the witness given when memory has been stimulated may directly contradict it. In actual practice, however, any paper not made by the witness or under circumstances such that he was familiar with its contents, and at or about the time of the transaction would be regarded with suspicion and its use not permitted. The more common case is that in which the paper is a record of a transaction which does not stimulate the memory of the witness, so that he can testify independently, but which he can testify to be correct from having known the matters therein contained, and of the making of the record. In such a case the paper must have been made at or about the time of the transaction by the witness, or under such circumstances that he can certify to its truthfulness from personal knowledge and must be an original, or the loss or destruction of the original must be shown.

⁴⁵ Hackart v. Decatur Coal Co., 243 Ill. 54.

In such a case the witness is sometimes said to have a past recollection of which he is able to certify that the paper is a correct record. In this case the paper must be offered in evidence in connection with the testimony of the witness. Professor Wigmore says upon this classification:

“At the outset an important distinction is met between that present actual recollection which a witness upon the stand may ordinarily be expected to exhibit—called here present recollection—and that recollection which once existed, but now, having irrevocably vanished, requires artificial preservation—called here past recollection. The use of the latter sort was for a time little recognized, and is even now often confused with the use of a present recollection.”⁴⁶

The case in which a witness who says that he has exhausted his recollection upon a subject may be asked a leading question, for the purpose of refreshing his memory, is analogous to the first class treated above. The memory of the witness must be aroused by the question and he must show a present independent recollection.

The distinctions above referred to are well illustrated in a recent case in which the issue was as to the condition of certain elevator appliances. An elevator inspector testified that he had no independent recollection of the condition in which he found the elevator without referring to his memorandum, and that after looking at that document he could tell in what condition the elevator was. The court directed the witness to read the memorandum and after having read it the witness said that he remembered the condition of the elevator, but could not describe it exactly. On cross-examination he said that aside from the memorandum he had no recollection whatever of anything he saw. The court in considering this question said:

“A witness can testify only to such facts as are within his own personal knowledge and recollection, but there are cases where writings may be used to assist his recollection and recall to memory forgotten facts. In *Greenleaf*

⁴⁶ Wigmore, *Evidence*, § 725.

on Evidence,⁴⁷ three cases are stated in which writings may be used for that purpose: *First*, where the writing is used only for the purpose of assisting the memory of the witness; *second*, where the witness recollects having seen the writing before, and although he has now no independent recollection of the facts mentioned in it, yet he remembers that at the time he saw it he knew its contents to be correct; and *third*, where the writing in question neither is recognized by the witness as one which he remembers to have before seen nor awakens his recollections to anything contained in it, but nevertheless, knowing the writing to be genuine, his mind is so convinced that he is on that ground enabled to swear positively as to the fact. The exact extent to which these rules should be recognized has never been defined by this court, but we agree with what is said in Elliott on Evidence,⁴⁸ that the third proposition is too broadly stated in permitting a witness, under all circumstances, to give his opinion that a fact exists merely because it is stated in a document which he believes to be genuine, when he remembers nothing of the facts stated and does not even remember to have seen the document before. The conclusion of a witness as to the existence of a fact derived from a consideration of other facts by which his mind is convinced ought not to be permitted to go to a jury, and the illustrations given by Greenleaf are cases where the witness, after seeing the writing, is able to state the fact positively and of his own knowledge.

“Without attempting to state comprehensive rules applicable to all cases in which writings may be used to assist the memory of a witness, it may be said that a writing can properly be used for the purpose of refreshing the memory of a witness if he is able, after inspecting the writing, to testify to the facts from present recollection. The testimony of the witness in this case did not come within that rule, for the reason that he clearly stated he had no independent recollection of the condition of the cable, dogs, or anything else about the elevator, even after looking at the memorandum. It did not revive his recollection or refresh his memory, and in testifying to the facts he relied solely upon the memorandum and testified to them because he found them written there. Another condition under which a writing may be used is where the witness, after inspecting a writing, still has no independent recollection of the facts stated therein, but is able to state that he

⁴⁷ Vol. 1, § 437.

⁴⁸ Vol. 2, § 859.

correctly reduced them to writing at the time of the occurrence or within such a time afterward that he had a perfect recollection of them. If the witness knows that the facts were recorded at the time or when they were fresh in his memory, and that the memorandum would not have been made unless he knew the facts therein stated to be true when it was made, he will be permitted to make use of it, provided the writing is produced with an opportunity for cross-examination as to it, so that the jury may also draw their conclusion as to the fact. In this case there was no evidence whatever that the memorandum truthfully or correctly represented the condition of the elevator or its appliances. The witness did not testify that the memorandum was a correct and accurate record of what he found upon his inspection.”⁴⁹

§ 15. Impeachment of Witnesses. The party producing a witness vouches for his credibility, is bound by his testimony, and is not permitted to attempt to impeach him except so far as such a result may naturally arise from the ordinary variance in the testimony of different witnesses. A witness is said to be impeached when the jury believes that he has wilfully sworn falsely upon some matter material to the issues being tried. The party against whom a witness has been produced may always attempt to impeach him and this may be done in various ways, (a) by producing evidence directly contradictory of the testimony given by the witness sought to be impeached; (b) by producing evidence of previous contradictory statements of the witness material to the issues; (c) by showing his prior conviction of a crime; (d) by showing his interest in the suit; (e) by introducing evidence of his hostility to the party against whom he testifies; (f) by showing that his general reputation for truth and veracity is bad.

In order to attempt to impeach a witness by evidence of previous contradictory statements made orally, it is necessary that a foundation therefor be laid when cross-examining him by asking him whether he made such state-

⁴⁹ *Diamond Glue Co. v. Wietzychowski*, 227 Ill. 338.

ments, embodying in the question the statements expected to be proven with the time, place, and person, to whom or in whose presence they were made. The object of laying such foundation is to enable the witness to identify the statements so as to be able to give whatever explanation there may be, and any form of question which is definite enough to actually enable the witness to identify the statements will be sufficient. If the witness admits that he made such statements further proof of them is superfluous. The fact that the witness is absent will not excuse the party against whom the testimony is offered from laying the foundation. Thus where a party has for the purpose of avoiding a continuance admitted that a witness if present would testify as stated in an affidavit filed to obtain such continuance and the affidavit is read in evidence, the party against whom it is read cannot introduce prior contradictory statements made by the absent witness, no foundation for impeachment having been laid or being possible under the circumstances.⁵⁰ An exception, however, exists when it is sought to impeach a party to the suit who is a witness in his own behalf, in which case no such foundation for impeachment is necessary. The reason given for the distinction is that a party to the suit is deemed to be interested, and because of such interest will be present at the trial to explain the impeaching statements whenever offered, whereas the ordinary witness will not usually be in attendance upon the trial after his testimony has been given. Another theory for the distinction is that so far as a party to the suit is concerned his prior contradictory statements either are admissions or at least of the same nature, and may consequently be offered under the rules relating to admissions without any preliminary foundation.

Where the previous contradictory statements are in writing it is necessary to lay a foundation for impeachment by showing the writing to the witness while upon the stand. It is not absolutely necessary to ask him any questions in reference to the paper, as the signature or handwriting

⁵⁰ North Chicago Street R. R. Co. v. Cottingham, 44 Ill. App. 46.

may be proven by other witnesses. The general rule in the United States is that a witness may not be interrogated as to whether he has written any certain paper without first showing it to him, when such interrogation is for purposes of impeachment. If the paper has been lost or destroyed such loss or destruction must first be shown and then the witness cross-examined as to its contents after which he may, if necessary, be contradicted by secondary evidence of the contents of the paper.⁵¹

“If the question is asked whether the witness has made certain representations, his counsel has the right to ascertain whether the representation or statement was written or oral, and if it appears to have been in writing, the paper should be produced before he is compelled to answer, unless it has been lost or destroyed. The witness should be allowed to examine the letter or other writing and (may then) be asked if it was written or authorized by him.”⁵²

Impeachment by showing interest or prior conviction did not exist at common law, as by its rules persons interested or who had been convicted of infamous crimes were incompetent to testify. In attempts at impeachment by showing prior conviction, it is necessary to prove the record with sufficient fullness to show the jurisdiction of the court rendering the judgment of conviction. Under the Evidence Statutes, this may be done by oral testimony and even by that of the witness himself upon cross-examination for this purpose. Upon the question of whether a witness may be cross-examined in respect to former arrests and indictments, there is a conflict of authority. On principle the arrests or indictments being mere accusations do not tend to the impeachment of the witness and evidence of them should be excluded and such is the weight of authority.

If it is expected to impeach a witness on the ground of hostility, the evidence of which consists in prior statements of the witness, the better rule requires that the witness be interrogated as to such statements in cross-examination.

⁵¹ Greenleaf, Evidence, § 464.

⁵² Jones, Evidence, § 847.

Impeachment by proof of bad reputation for truth and veracity, must be by witnesses who know such reputation amongst their neighbors. The evidence is confined to general reputation, and testimony as to particular conduct cannot be given. When the impeaching witness has testified that he knows such general reputation and that it is bad he may then be asked whether or not he would believe such person under oath. In many jurisdictions testimony may be adduced as to the bad reputation of a witness upon other matters than truth and veracity, while other courts limit such evidence strictly to the single point. Thus it has been said in respect to an attempted impeachment of a witness:

“No one witness swears that he knows his general character for truth and veracity. They have heard something against him, mostly as to his character for other matters besides truth and veracity, and evidently have heard them from persons who referred to particular transactions. This is not the evidence which the law permits, or should permit, to affect the credibility of a witness. With many, telling the truth is a habit and a principle which they adhere to always, though they may indulge in drinking, swearing, gambling, boastering, or making close bargains. With others, lying is the habit or principle, and if elevated to be senators or legislators, or made church members or deacons, it does not always reform them. The object of the law is to show the character of the witness as to telling the truth; general reputation in the community where he is known is the test and the only test which the law allows as to character.”⁵⁸

Impeachment means more than a mere conflict of evidence and goes directly to the credibility of the witness. If the impeaching evidence is such that the tribunal may believe that the witness sought to be impeached has wilfully sworn falsely upon a matter material to the issue, then the rule is that if they do so believe they may disregard the whole testimony of such witness except in so far as corroborated by other competent evidence. This distinction between attempts at impeachment and successful

⁵⁸ *Atwood v. Impson*, 20, N. J. Eq. 157.

impeachment must be carefully noted and where the issues are before a jury the appropriate instructions must be requested.⁵⁴

While an attempt may always be made to impeach a witness by proof of prior inconsistent statements, his testimony cannot be corroborated by proving his prior consistent statements unless such an attempt at impeachment is made, or it is charged that his story is actuated by a particular motive or is a recent fabrication, in each of which cases it may be shown that his statements have been consistent and that he told the same story before the motive existed, or before the time when it is charged the fabrication was made.⁵⁵

§ 16. Corroboration. A party may always produce corroborative evidence although it is within the discretion of the court to place limits upon merely corroborative evidence, in order to expedite its business. Such discretion will rarely be exercised in contested cases against a party who has the burden of convincing the tribunal, as he is entitled to produce as much evidence as he thinks necessary for that purpose. Corroborative evidence is always required (a) In case of treason; (b) where proof of a crime is made by the testimony of an accomplice or (c) by means of a confession of the accused; (d) in cases of divorce; (e) in chancery cases to rebut the sworn answer of the defendant to the bill of complaint.

The rule in cases of treason in this country arises from the provision of the Constitution of the United States requiring the testimony of at least two witnesses to the same overt act. The requirement in the cases of accomplices and confessions grows out of the experience of the courts as to the unreliability of such evidence. But in the absence of statute to the contrary,⁵⁶ a conviction upon the uncorroborated testimony of an accomplice may be permitted in the discretion of the court. In cases of divorce, public policy forbids collusion which would be fostered if

⁵⁴ Beedle v. People, 204 Ill. 200.

⁵⁵ Jones, Evidence, § 769.

⁵⁶ Waller v. People, 209 Ill. 284.

divorces were granted upon the unsupported testimony of the complainant, and in the interest of the stability of the marriage relation requires corroboration, such rule of public policy being generally embodied in the divorce statutes. Under the practice in equity unmodified by Statute, the sworn answer to the bill of complaint must be met by the testimony of two witnesses, or that of one with corroborating circumstances. Under modern statutory practice the complainant is frequently permitted to waive a sworn answer to his bill of complaint and thus avoid the situation created by the earlier practice.

RELEVANCY OF EVIDENCE

The terms material and relevant are used almost interchangeably in the law of evidence. A matter of fact is material if it is within the issues being tried; it is relevant if legally its proof tends to prove a fact within the issues.⁵⁷ Relevancy is largely a question of logical tendency, but long experience and practice of the courts in the trial of cases has so fixed the legal rules in regard to the relevancy of certain classes of facts to each other, that the question of logical tendency has in respect to these become comparatively unimportant. Thus under well established rules all the facts so intimately connected with the facts in issue as to form a part of the same transaction,⁵⁸ are held to be relevant, and are embraced with the term *res gestæ*. In the same way facts introductory or explanatory,⁵⁹ and showing opportunity or cause or effect are always legally relevant. Upon this question Mr. Stephen says as to what constitutes relevancy and as to certain matters which are generally excluded though logically relevant:

“A fact is relevant to another fact when the existence of the one can be shown to be the cause, or one of the causes or the effect or one of the effects, of the existence of the other, or when the existence of the one, either alone or together with other facts, renders the existence of the other

⁵⁷ *Grubb v. Burford*, 98 Va. 553.

⁵⁸ *Schmidt v. Packard*, 132 Ind. 398.

⁵⁹ *State v. Lyon*, 10 Iowa 340.

highly probable, or improbable, according to the common course of events.

"Four classes of facts, which in common life would usually be regarded as falling within this definition of relevancy, are excluded from it by the Law of Evidence except in certain cases:

"(1) Facts similar to, but not specially connected with each other. *Res inter alios acta*.

"(2) The fact that a person not called as a witness has asserted the existence of any fact. (Hearsay.)

"(3) The fact that any person is of opinion that a fact exists. (Opinion.)

"(4) The fact that a person's character is such as to render conduct imputed to him probable or improbable. (Character.)

"To each of those four exclusive rules there are, however, important exceptions, which are defined by the Law of Evidence."⁸⁰

It is clear also from what has already been said about the competency of witnesses that the mere fact that testimony is relevant does not entitle it to admission unless there is a competent witness who is able to testify as to the facts. Thus where the defendant is defending as the administrator of the estate of a deceased person against a claim urged against such estate, the testimony of the claimant might upon all the rules of logic be relevant, but under the rules of law be inadmissible under either the common law or modern statutes in reference to the testimony of parties to a suit. In order to be admissible testimony must be relevant and also capable of proof by a competent witness.

§ 17. Negative Evidence. "The object of evidence is the ascertainment of truth, and that and many rules have been adopted, which the experience and wisdom of the great judges of the past have found best calculated to accomplish the purpose of proving and establishing facts upon which the law must act. One of these rules is that positive evidence is entitled to more weight than negative evidence. This rule is too firmly established to be questioned. But

⁸⁰ Stephen, Evidence, Introduction.

it is necessary that we determine what is affirmative and what is negative evidence. Where a witness swears that a particular act occurred at a specified time and place; or that particular language was spoken by a person to whom he refers, this is affirmative evidence. But, if another witness were at the same place at the same time, and were to swear that he did not observe the act, or hear the language of which the other speaks, this would be called negative evidence. But, suppose the latter witness were to state that his attention was fully excited to what occurred, and what was said, and that the act of which the other spoke did not occur, or that the language was not used by the person to whom it was attributed, this would be as fully affirmative evidence as the other; if his opportunities were the same, and his attention was equally engaged in reference to the circumstance as that of another, his testimony is affirmative equally with that of the other. It may be illustrated by a witness who swears that he saw a person at a specified place at a particular time—another witness, or the person himself, swears, that he was not there at the time, but was then at another place. One of these statements is as much an affirmation as the other. The mere fact that he makes the affirmation in a negative form does not change its character. On the other hand, a witness says he was at a particular place at a specified time, and did not hear certain declarations, but was giving but slight attention—this would be slight and negative evidence that the declarations were not made. But, if another person was to state that he was present and heard all that was said, and that no such declarations were made, his evidence would be affirmative.”⁶¹

To the rule that testimony negative both in form and quality is not to be regarded as of the same weight as positive testimony—other circumstances being the same—it is sometimes held as an exception that where the question is one of notoriety depending upon the general knowledge of those living in a certain neighborhood, negative evidence is entitled to as great weight as affirmative.⁶²

Under the general rule it has quite frequently been held that the absence of entries in books or records cannot be

⁶¹ *Frizell v. Cole*, 42 Ill. 364.

⁶² *Banta's Heirs v. Clay*, 9 Ky. 409.

shown, for instance, to prove that money was not paid,⁶³ that merchandise had not been delivered,⁶⁴ and the like. On the other hand the absence of the name of an employe upon his employer's books which showed those of other employes has been held competent where the question was the existence of the employe whose name was not shown;⁶⁵ and a teller's book of a bank, kept by a person deceased at the time of the trial, has been held admissible to show by its absence of entries that on certain days no moneys were received for certificates of deposit.⁶⁶

§ 18. Evidence of Similar Facts. Evidence of transactions similar to the one in issue is not ordinarily admitted,⁶⁷ as to do so would bring up a multitude of collateral issues. Thus the courts will refuse in a negligence case to permit evidence by the defendant that the appliances in question were those ordinarily used or that with the use of the same apparatus there had been no prior similar accidents.⁶⁸ That a similar occurrence has previously taken place may, however, be relevant in negligence cases where it is sought to charge one or the other of the parties with notice or knowledge of a dangerous condition, and in some cases it has been held that such evidence is admissible for the purpose of showing that the condition was dangerous.⁶⁹ Similar representations or occurrences may always be shown where they tend to show or are part of a system of conduct,⁷⁰ and in cases of fraud or of a like nature to show the *animus* which actuated the person charged with the fraudulent conduct.⁷¹ As suggested above, on the question of notice in negligent cases, similar facts or transactions if not too remote in time may always be shown to charge a

⁶³ *Riley v. Boehm*, 167 Mass. 183; *Scott v. Bailey*, 73 Vt. 49.

⁶⁴ *Lawhorn v. Carter*, 74 Ky. 7.

⁶⁵ *People v. Kemp*, 76 Mich. 410.

⁶⁶ *American Surety Company v. Pauly*, 72 Fed. Rep. 470.

⁶⁷ *Merchants Nat. Bank of Rome v. Greenwood*, 113 Ga. 306.

⁶⁸ *Beidler v. Branshaw*, 200 Ill. 425; *M. & O. R. R. Co. v. Vallowe*, 214 Ill. 129; *Bassett v. Shares*, 63 Conn. 43.

⁶⁹ *City of Chicago v. Jarvis*, 226 Ill. 614.

⁷⁰ *Brownell v. Briggs*, 173 Mass. 529.

⁷¹ *Smith v. Brockett*, 69 Conn. 492.

person with knowledge and also to prove his intent. Evidence of other business transactions between the same parties, or by one of them, will ordinarily not be admitted, unless connected with the one in question or unless it tends to show a usage or custom. Thus it has been held that in a suit against a railroad company for damages to freight, testimony that the plaintiff had trouble with the defendant in another transaction was held inadmissible,⁷² and in a suit against a bank the form of letter heads used by other banks was not admitted.⁷³ On the other hand evidence of prior like transactions between the same parties has been held admissible for the purpose of showing a waiver by one of them.⁷⁴ For the purpose of proving value, actual sales of the same kind of property in like quantities and under similar conditions at or near the time in question may be shown. This rule has frequently been applied in proving the value of real estate,⁷⁵ as well as to personal property.⁷⁶

In this connection it may properly be noted that though consisting of a number of similar transactions the ordinary custom in the conduct of a business may be shown in order to give rise to the inference that any certain act ordinarily a part of such course of business has been done. Thus in a recent case it was held that in order to give rise to the inference that a certain letter was stamped before it was mailed, it might be shown in evidence that the envelopes used in the office of the writer of the letter were those bearing the printed stamp of the government and that these were customarily used for his correspondence.⁷⁷ In another case it was held that a public officer might testify as to the uniform course of business in his office in order to show that he had performed a particular official duty of which

⁷² *Hendrick v. Boston & Albany Ry. Co.*, 170 Mass. 44.

⁷³ *Kling v. Irving Nat. Bank*, 21 N. Y. App. Div. 373.

⁷⁴ *Summerville v. Penn Drilling Co.*, 119 Ill. App. 152.

⁷⁵ *Dady v. Condit*, 209 Ill. 488; *Pierce v. City of Boston*, 164 Mass. 92; *City of Paducah v. Allen*, 111 Ky. 361.

⁷⁶ *Home Construction Co. v. Church*, 14 Ky. Law. Rep., 1907; *Berry v. Nall*, 54 Ala. 446; *Carr v. Moore*, 41 N. H. 131; *James H. Rice Co. v. Penn Plate Glass Co.*, 117 Ill. App. 356.

⁷⁷ *Hurch v. Americus Grocery Company*, 125 Ga. 153.

performance he had no independent recollection.⁷⁸ Ordinarily proof of other crimes whether similar to that charged or not cannot be shown to prove the guilt of the defendant in a criminal case.⁷⁹ To this, however, there are some well-recognized exceptions, on trials for uttering counterfeit money other instances of uttering such money by the defendant may be proven if not too remote in time. The same rule is applied in prosecutions for receiving stolen property. These, however, apparently come within the general principle of admissibility to prove notice or knowledge.⁸⁰ Conviction of a similar offense is of course relevant where the defendant in a criminal case is being tried for a second offense, the penalty for which is dependent upon whether there has been a prior conviction for another crime of the same nature.

§ 19. Character. Character in the law of evidence is, when relevant, shown by proof of general reputation. As a general rule evidence of the character of a person is held irrelevant and cannot be shown in order to give rise to an inference for or against him, or that he did, or did not do any certain thing.⁸¹ This is subject to the general exception that the defendant in a criminal case may offer evidence of his good character as a part of his defense, for the purpose of showing the improbability of his having done the thing with which he is charged. In reference to the theory upon which this exception is based it was stated in reference to a prosecution for receiving stolen goods:

“Proof of this kind may sometimes be the only mode by which an innocent man can repel the presumption of guilt arising from the possession of stolen goods. It is not proof of innocence, although it may be sufficient to raise a doubt of guilt.”⁸² “The reason for the rule and its exception may probably be explained, partly, by the fact that while in our daily experience it is no unusual thing

⁷⁸ *Gate City Abstract Co. v. Post*, 55 Neb. 742.

⁷⁹ *Lyons v. People*, 137 Ill. 612.

⁸⁰ *Jones*, *Evidence*, §§ 143, 144.

⁸¹ *Thompson v. Bowie*, 71 U. S. 463.

⁸² *Jupitz v. People*, 34 Ill. 521.

to find men occasionally acting in a manner very inconsistent with their general character, it is extremely rare to find that a person who has always maintained a good reputation in the community will be willing to forfeit at once all claims to future respectability by the commission of an offense that would subject him, if discovered, to the danger and disgrace of a criminal prosecution; and partly by that solicitude of the common law to give the accused, in criminal cases, the benefit of every reasonable doubt."⁸³

If evidence of good character is offered for the defense the prosecution may then in rebuttal introduce evidence of bad character. In such cases the character to be shown is general⁸⁴ and upon the particular subject matter of the offense charged. Thus in a charge of larceny, the character of the defendant for honesty is in question; in an assault, his character for peace and good order.

Where suit is brought to recover damages for death and the burden is upon the plaintiff to prove freedom from contributory negligence on the part of the decedent, if there are no eye witnesses to the injury, then the good character of the decedent for habits of care, may be shown to give rise to the inference of due care on his part at the time of the injury. Thus it was said in such a case:

"The court allowed testimony to be produced to show the deceased had the reputation of a careful and competent engineer and of a sober man. Whether the explosion was occasioned by a lack of ordinary care on the part of the deceased was at issue. It was incumbent on the plaintiff to maintain the negative of that contention. . . . No one other than the fireman was in the cab of the engine, or so situated as to be able to see the acts and conduct of the deceased engineer. The fireman was also killed by the explosion. The exploding engine was seen by other witnesses, but they could not see what the deceased did at the time of and immediately before the explosion occurred. Such being the fact, we think the court properly regarded the evidence as to the general reputation of the deceased as a careful and competent engineer and a sober man, to be admissible as testimony tending to establish that

⁸³ Reynolds, Trial Evidence, 25.

⁸⁴ Hart v. McLaughlin, 51 N. Y. App. Div. 411.

he exercised ordinary care on the occasion under investigation.”⁸⁵

It will be noted that this evidence is only admitted in the absence of better proof, and it is thought that the exception may be extended to any case of necessity from lack of other evidence where the logical inference is relevant.

In civil cases the character of a party to a suit may be directly in issue, as for instance, in certain torts where it becomes material on the amount of damages. These are questions of substantive law, and of course wherever as a matter of substantive law character is in issue evidence thereof may be offered.⁸⁶

§ 20. Remoteness. In order to expeditiously carry on its business the court is authorized to reject matters which though logically relevant are only remotely connected with the facts in issue. Many of the decisions which purport to be based upon this principle have involved questions of similar facts such as are treated above under that head. Where the question is one of true remoteness, it is a matter for the sound judicial discretion of the court, as to whether its business will be unduly delayed by the introduction of such matters, always bearing in mind that the party offering such evidence has a right to introduce everything legally probative, which right the court is not authorized to limit.⁸⁷ The rule has been stated as follows:

“Provided that the judge may exclude evidence of facts which, though relevant or deemed to be relevant to the issue, appear to him too remote to be material under all the circumstances of the case.”⁸⁸

§ 21. What the Witness May Relate. The witness is limited in his testimony to relating those relevant things for the truth of which he is able to vouch, because he has observed them through the operation of his own senses,

⁸⁵ Ill. Central R. R. Co. v. Prickett, 210 Ill. 142.

⁸⁶ Fahey v. Crotty, 63 Mich. 383.

⁸⁷ True v. True, 33 Me. 367.

⁸⁸ Stephen, Evidence, Art. 2.

and as it is said has personal knowledge of them. He is not permitted to relate second hand the observations made by some other person and communicated to him. Such observations so communicated and related by a witness, constitute what is known as "hearsay" and are inadmissible. In respect to this it has been said:

"What we are here concerned with is a different notion, namely, that when a specific person, not as yet in court, is reported to have made assertions about a fact, that person *must be called to the stand*, or his assertions will not be taken as evidence. That is to say, suppose that *A* who does not profess to know anything about a robbery, is offered to prove that *B* who did profess to know, has asserted the circumstances of the robbery; here *B's* assertion is not to be credited or received as testimony, however much he may know, unless *B* is called and deposes on the stand."⁸⁹

Thus the testimony of a witness in a trial for murder, that he had heard a person other than the defendant say that such other person killed the deceased is hearsay and inadmissible in favor of the defendant, while if the witness had been present at the time of the killing he might testify as to any matters observed by him through his senses, which would tend to identify the guilty person.⁹⁰ Neither is the witness permitted to testify as to his inferences, conclusions, or opinions, as to the observations made by him, but is limited in his testimony to the facts which he has himself observed in reference to the facts in issue, or in reference to other facts, which if proven will give rise to a logical and legal inference of the existence of the facts in issue.⁹¹ If his testimony is to observations directly upon the fact in issue, his evidence as we have previously seen, is said to be direct; if as to facts the proof of which will give rise to an inference of the existence of the facts in issue, his evidence is said to be circumstantial in its nature. The basis for excluding hearsay is concisely stated by Mr. Reynolds as follows:

⁸⁹ Wigmore, Evidence, § 1364.

⁹⁰ State v. Haynes, 71 N. C. 79.

⁹¹ Zube v. Weber, 67 Mich. 52; Henry v. Stewart, 185 Ill. 448.

“The reasons for the rule excluding hearsay, or, as Mr. Best more accurately terms it, ‘derivative evidence’, are not difficult to discover, for apart from the circumstance that the probabilities of falsehood and misrepresentation, either wilful or unintentional, being introduced into a statement are greatly multiplied every time it is repeated, there remains the further fact that the original statement, even if correctly reported, has scarcely ever been made under the safeguards of the personal responsibility of the author as to its truth, or the tests of a cross-examination as to its accuracy. It is indeed true, that, in the ordinary affairs of life, men often act upon information received at second hand, but this is seldom done in matters of much importance, unless either they or their informants possess sufficient personal knowledge of the party from whom the statement originated to form an intelligent estimate of his general disposition to speak the truth, the temptation he may be under to deceive, and his probable means of accurate information in regard to the subject matter of his statement. Such personal knowledge the courts can rarely possess, and, therefore, three tests have been provided, to which, in general, all statements must be subjected before being admitted as evidence in judicial proceedings. These are: (1) That the statement must be made under the moral obligation of a solemn oath or affirmation, with the liability to a criminal prosecution for perjury in case of falsehood. (2) That the party against whom the testimony is given shall have the opportunity of cross-examining the witness, in order to elicit his sources of information as well as any material facts within his knowledge which he may not be disposed to disclose voluntarily, and also to test the general accuracy of his statements, and to show if he has any bias in regard to the matter in dispute. (3) That the witness should give his testimony in open court, in order that the jury may observe his demeanor while giving it.”⁹²

§ 22. Statements of Others as Original Evidence. It is obvious that in many instances the question whether certain statements have been made by others than the witness are directly in issue and that in such a case they are original evidence. Thus the issue may be as to the making of statements alleged to constitute an oral contract, in which case it is plain that the witness may testify as to what was said

⁹² Reynolds, Evidence, 19.

by the parties to the alleged contract. Or the issue may be as to the making of alleged slanderous statements when of course any witness who heard the defendant speaking at the time such statements were made may relate what he heard. In general in any case where the making of statements is in issue any witness who was present may relate what he heard as original evidence and no question of hearsay is involved.⁹³

§ 23. Statements Made by Telephone. Under modern conditions it not infrequently happens that material and relevant statements desired to be proven have been made by telephone. In such a case if the person to whom they are made, or any other person hearing them is able to recognize and testify to the identity of the voice of the speaker, such testimony will be sufficient as a basis for their introduction. If, however, the voice of the person speaking is unknown to the witness, a very different question is presented. In reference to such a case it has been said:

“When a person places himself in connection with the telephone system through an instrument in his office, he thereby invites communication in reference to his business, through that channel. Conversations so held are as admissible in evidence as personal interviews by a customer with an unknown clerk in charge of an ordinary shop would be in relation to the business there carried on. The fact that the voice at the telephone was not identified does not render the conversation inadmissible.”⁹⁴

The weight to be given to such a conversation is for the jury.⁹⁵ Upon the theory that the operator was the agent of both parties a telephone conversation in which questions and answers were repeated to the parties has been held admissible.⁹⁶ In general the voice of the person sought to be charged must be identified, or his control of the telephone used in communication must be shown, or the

⁹³ Jones, Evidence, § 300.

⁹⁴ Wolfe v. Missouri Pac. R. Co., 97 Mo. 473.

⁹⁵ Godair v. Ham Nat. Bank, 225 Ill. 575.

⁹⁶ Sullivan v. Kuykendall, 82 Ky. 483.

existence of an express or implied agency which will bind such person under the rules as to principal and agent must be proven.⁹⁷

§ 24. Phonographs Operated in the Presence of the Tribunal. Upon the same principle as that underlying the rule permitting testimony as to statements made by telephone, the operation of a phonograph in the presence of the jury trying the issues in a cause has been permitted. This principle has been stated as follows:

“A phonograph was permitted to be operated in presence of the jury to reproduce sounds claimed to have been made by the operation of trains in proximity to respondent's hotel. With proper proofs, such as were fully given in this case, to justify the introduction of the instrument as a substantially accurate and trustworthy reproduction of the sounds actually made and testified to, we think its use legitimate. Communications conducted through the medium of the telephone are held to be admissible, at least in cases where there is testimony that the voice was recognized. . . . The ground for receiving the testimony of the phonograph would seem to be stronger, since in its case there is not only proof by the human witness of the making of the sounds to be reproduced, but a reproduction by the mechanical witness of the sounds themselves.”⁹⁸

§ 25. Res Gestæ. It must also be noted in this connection that when declarations by actors therein accompany the fact in controversy, or issue, so closely as to form a part of it, or of the same transaction,⁹⁹ and tend to qualify or explain it, such declarations may be related upon the witness stand by any person who heard them and are treated as original evidence and not as hearsay,¹⁰⁰ the theory being that these declarations are just as much a part of the acts¹⁰¹ of the actors in the transaction as anything else done by them and thus entitled to be considered as original evi-

⁹⁹ *Carter v. Buchannon*, 3 Ga. 513.

⁹⁷ *Pumphrey v. Giggey*, 150 Ill. App. 473.

⁹⁸ *Boyne City, Gaylord & Alpena R. R. Co. v. Anderson*, 146 Mich. 330.

¹⁰⁰ *Luse v. Jones*, 39 N. J. Law 707.

¹⁰¹ *Graves v. People*, 18 Colo. 170.

dence. The question as to whether such declarations are a part of the same transaction as the facts in issue is not always an easy one and the decisions of the courts are not always uniform as to the tests to be used.

“A transaction is a group of facts so connected together as to be referred to by a single legal name, as a crime, a contract, a wrong, or any other subject of inquiry which may be in issue.”¹⁰²

The weight of authority is to the effect that the declaration sought to be introduced must have been made by an actor in the transaction contemporaneously¹⁰³ with the main facts of the transaction in issue, and, of course, the declaration or statement must be such as to qualify or explain, or it will not be relevant.¹⁰⁴ In many cases the declarations sought to be introduced are not made by parties to the suit but by persons in some relation or alleged relation of agency to them.¹⁰⁵ The question of admissibility then becomes involved with the further question of the law of agency, that is, as to whether the party sought to be charged was at the time of the statement being represented by the person making it, within the scope of the authority conferred upon him.¹⁰⁶ As we shall see later if the statement is made by a party to the suit it may always be introduced in evidence against him as an admission. Cases turning upon the authority of an agent will not be discussed here as they are more properly treated under the law of agency. It must be noted, however, that the agency must always first be shown by evidence¹⁰⁷ other than the statements of the agent himself, such statements being so far as his principal is concerned mere hearsay until the agency is established by competent evidence.¹⁰⁸

A rule upon which all the authorities are agreed is that a statement cannot be introduced as a part of the *res gestæ* if it is merely a narration of a past occurrence. Yet in the

¹⁰² Stephen, Evidence, Art. 3.

¹⁰³ Nelson v. Smith, 28 Ill. 495.

¹⁰³ Rockwell v. Taylor, 41 Conn. 55.

¹⁰⁷ Sumner v. Saunders, 51 Mo. 89.

¹⁰⁴ Binns v. State, 57 Ind. 46.

¹⁰⁸ Winch v. Baldwin, 68 Iowa 764.

¹⁰⁵ Sisson v. Cleveland & T. Ry. Co., 14 Mich. 480.

application of this rule each case must be governed to a great extent by its own circumstances. Thus Mr. Jones says:

“There is another class of cases which hold that declarations may in some cases be received although made after the act in question, provided they were uttered after the lapse of so brief an interval and in such connection with the principal transaction as to form a legitimate part of it and when it is plain that the act is the inducing cause of the declaration. For example, in a Massachusetts case, upon a trial for murder, a witness testified that at the moment the fatal stabs were given he heard the victim cry out: ‘I am stabbed’ and that he at once went to him and reached him within twenty seconds after that and that he then heard him say: ‘I am stabbed. I am gone. . . . Dan Hackett has stabbed me.’ Although the court conceded that testimony as to declarations of this character should be restricted within narrow limits, it was held that the declarations, although made after the homicidal act, were in fact a part of the transaction. While the English case already mentioned, in which it was held that a statement made by a person immediately after the act, while running out of the room in which her throat had been cut, was incompetent,¹⁰⁹ illustrates the strictness of the one class of decisions which hold that the declarations must be contemporaneous with the act. A well known decision of the Supreme Court of the United States may be cited as one which carries the more liberal rule to the extreme limit. In the case referred to,¹¹⁰ the action was on a life insurance policy, and for the purpose of proving that the death was caused by falling downstairs at night, the statement of deceased to members of his family soon after the alleged accident, and after he had returned to his room was held inadmissible. The cases already cited sufficiently illustrate the fact that there is often no little difficulty in determining whether the declarations are so far contemporaneous with the main fact or transactions as to be admissible, and that it is impracticable to fix, by any general rule, any exact instant of time so as to preclude debate and conflict of opinion in regard to this particular point.”¹¹¹

¹⁰⁹ *Rex. v. Bedingfield*, 14 Cox Cr. C. 341, 14 Am. Law Review 817.

¹¹⁰ *Ins. Co. v. Mosley*, 8 Wall. 397.

¹¹¹ *Jones, Evidence*, § 346.

In suits to recover for personal injuries and in some other classes of cases it is often material to know whether declarations made by a person in reference to bodily feelings may be received in evidence. Some authorities limit the declarations which may be received to groans and involuntary exclamations of pain, and there can be no doubt that such are always admissible upon the question of a present bodily condition at the time they are made.¹¹² Some courts admit statements made to the regular attendant physician during treatment, and exclude those made during examination by a physician who is making an examination merely for the purpose of qualifying himself to testify as an expert upon the question of the injuries complained of. In reference to such a case it has been said by the Supreme Court of Illinois in a recent case:

“The declarations of an injured party as to his physical condition, brought about as a result of injury, are self-serving, and, at the best, hearsay evidence. Statements, however, made by an injured party which form a part of the *res gestæ*, or those made to his physician during treatment, constitute an exception to the general rule, and are admitted by reason of the fact that he will not be presumed to prevaricate at the very instant of his injury, or while he is stating his physical condition to a physician from whom he expects and hopes to receive medical aid, nor will he be presumed to feign disease, pain, or distress under those conditions in which he is ordinarily observed by strangers, or his friends and neighbors. No such safeguards, however, surround him when he is being examined by an expert whom he has employed to examine him and to give evidence in his case which is about to be tried in court. To permit the injured party, while undergoing an examination by an expert in his employ, by jerks and twitches, by a pressure of his hand, by turning his toes in or by dragging one of his legs when walking, to thus make evidence for himself, and then to permit his expert to go before the jury and bolster up and strengthen by his opinion the self-serving testimony thus manufactured by the injured party, would open up the door wide for the grossest fraud, which might work upon his adver-

¹¹² Bacon v. Inhabitants of Charlton, 61 Mass. 586.

sary the most palpable injury. This character of self-serving testimony has been held incompetent by the Supreme Court of Michigan in *McKormick v. City of West Bay City*,¹¹³ and *Comstock v. Georgetown Township*,¹¹⁴ and the general rule announced by that court is, we think, in entire harmony with the ruling of this court in the numerous cases hereinbefore cited, and is the correct rule and the one most conducive to justice. We do not intend to hold, however, that a physician may not be able, from an examination of an injured party, to form and express an opinion as to his physical condition, and the probable cause which induced such condition, based upon objective testimony alone, but what we do intend to hold is, that a physician who has not treated the injured party but who has made an examination of the injured party solely with a view to testify as an expert, should not be permitted to express an expert opinion to the jury based upon subjective conditions, and then be allowed to fortify his opinion by stating to the jury acts of the injured party which could have been purely voluntary and under the control of the injured party, and which may rest upon no other basis than the truthfulness of the injured party."¹¹⁵

In a case where the plaintiff testified that the statements made by her to a physician who was making an examination for the purpose of qualifying as an expert were true the court held that they were inadmissible and reversible error.¹¹⁶

Where the statement sought to be introduced is made by a third person or bystander, who is not an actor in the transaction, of course no successful attempt can be made to bind any of the parties to the transaction upon any theory of agency, and the question narrows down to whether such statements ought to be admitted as an exception to the rule against hearsay and as entitled to credibility upon the ground of their being spontaneous exclamations, and thus likely to be true. But it is clear that a person may make a spontaneous exclamation as the result of a mistaken

¹¹³ 110 Mich. 265.

¹¹⁴ 137 Mich. 541 (100 N. W. Rep. 788).

¹¹⁵ *Greinke v. Chicago City Ry. Co.*, 234 Ill. 569.

¹¹⁶ *Shaughnessy v. Holt*, 236 Ill. 487.

observation made by him as well as if the observation were correct and represented the truth. In fact, common experience teaches that observations made under excitement and statements made thereupon without reflection, are much less likely to be correct than those made with deliberation. With no opportunity to test by cross-examination the correctness of the observation which lies at the basis of the spontaneous exclamation the party against whom it is offered is at a disadvantage, which the law ought not to permit. The fallacy that spontaneous exclamations are necessarily truthful enough to be admitted because of their spontaneity has sometimes received the sanction of courts and text writers. Thus it has been said in respect to this theory:

“This general principle is based on the experience that under certain external circumstances of physical shock, a stress of nervous excitement may be produced which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection, the utterance may be taken as particularly trustworthy (or, at least, as lacking the usual grounds of untrustworthiness) and thus as expressing the real tenor of the speaker’s belief as to the facts just observed by him; and may, therefore, be received as testimony to these facts.”¹¹⁷

It will be seen from the foregoing quotation that the “real tenor of the speaker’s belief as to the facts” is confused with the facts themselves. Many of the cases where the “spontaneous statement” principle has been applied have related to questions of identification. The question is as to the identity and not as to what any person believed about it. Nothing is more familiar in experience than the genuine mistakes as to identity of others, made by persons

¹¹⁷ Wigmore, Evidence, § 1747.

not under stress of excitement and with opportunity for reflection; that the opportunity for mistake is much greater when excited is obvious. The theory of the truthfulness of spontaneous statements seems to be that when opportunity is given for reflection a falsehood will be formulated. If the statements of parties to the suit only were offered there might possibly be something in this, but as a matter of fact, statements of such persons if contrary to their interests can always be introduced as admissions. In respect to third persons there seems to be no reason why the law should presume that the moment there was opportunity for reflection a falsehood would be elaborated, and it is in respect to statements made by such person that this question has most frequently arisen.

§ 26. Complaints. It is sometimes stated broadly that in criminal cases the fact that the person against whom the offense is alleged to have been committed made a complaint to persons to whom he would naturally complain, is always relevant and admissible.¹¹⁸ In the United States that such complaint has been made is admissible in prosecutions for rape and other offenses against women but not in prosecutions for other offenses. The terms of the complaint are generally held to be irrelevant,¹¹⁹ although held admissible under some decisions.¹²⁰

ADMISSIONS

Admissions have been defined as "acknowledgments of a person against his interest, either by oral or written statements, or by conduct."¹²¹ The admissions of a party to a suit consisting of his statements or implied because of his acquiescence in statements made by others, may always be proved against him when material. Such admissions may be either made formally during the progress of the trial of the suit in the pleadings, or by stipulation, or otherwise, or informally, and the fact that they frequently consist of statements does not make them hearsay. They

¹¹⁸ Stephen, Evidence, Art. 8.

¹²⁰ *State v. Kinney*, 44 Conn. 153.

¹¹⁹ *State v. Knapp*, 45 N. H. 148.

¹²¹ Hughes, Evidence, 21.

are relevant because they are the statements of a party himself against his own interest.

§ 27. Formal Admissions. Formal admissions consist of judgments against a party, or his statements made under his seal, or stipulations entered into by his counsel containing statements of fact and designed to be used in the trial of the suit. It is hardly necessary to notice admissions made in the pleadings, for the reason that the very purpose of these is to eliminate matters of dispute, and evidence only becomes necessary upon such matters as are left in dispute by the pleadings. It has sometimes been held that if the statement of an attorney made at the opening of the trial did not contain sufficient facts to make as a matter of law a case or a defense, that such insufficiency might be taken as an admission of the party on whose behalf such statement was made and a verdict directed in favor of the opposing party. But the better rule is that a verdict ought not to be directed in such a case, and to the effect that if the parties have a right to a trial by jury of the issues made by the pleadings, the verdict must rest upon evidence or want of evidence, and not upon opening statements.¹²²

§ 28. Informal Admissions. Informal admissions consist in any statements made by a party against his own interest in the suit in which such admission is to be used, either in writing not under seal, or by word of mouth, or by acquiescence. Direct statements made either by word of mouth, or in writing need no special comment. A more difficult situation arises in cases in which it is sought to charge a party to a suit with admissions implied because of his silence when statements contrary to his interest are made in his presence. Whenever such presence and apparent ability to hear¹²³ are shown, evidence of all statements made therein by third persons may be given,¹²⁴ leaving it open to the party against whom they are offered to show any contradiction made by him, or that from his position or for some other reason, he was unable to hear or under-

¹²² *Pietsch v. Pietsch*, 245 Ill. 454. ¹²⁴ *Commonwealth v. Call*, 38 Mass. 515.

¹²³ *Martin v. Capital Ins. Co.*, 85 Ia. 643.

stand¹²⁵ the statements as made and consequently did not contradict them. The basis of this rule is that when the statements are made in a person's presence and contrary to his interests, he will contradict them, and that if he does not do so he impliedly admits their truth.¹²⁶ It is to be noticed in this connection that the rule is different where the statements sought to be proved are in writing. A person may receive letters containing statements adverse to his interests, but he is under no legal obligation to answer such letters unless he chooses, and the fact that he has thus received them without answer cannot be shown against him. In reference to this it has been said:

"A letter written by a party is not admissible in his own favor, except as a notice or a demand.¹²⁷ Letters written by the contractors to the city officials did not tend to prove or disprove any issue in the case, and were clearly inadmissible. Such testimony tended to prejudice the minds of the jury against the city and in favor of the contractors. The mere fact that letters were received and remained unanswered, has no tendency to show an acquiescence of the party in the facts stated in them. A party is not to be driven into a correspondence of that character to protect himself from such consequences. In the case of *Firbee v. Denton*,¹²⁸ the plaintiff had sent a letter to the defendant, demanding a sum of money as due to him, to which no answer was returned. On the offer to prove its contents . . . Lord Tenterden, C. J., observed: 'I am slow to admit that what is said to a man before his face, he is in some degree called on to contradict, if he does not acquiesce in it; but the not answering the letter is quite different; and it is too much to say that a man by omitting to answer a letter at all events admits the truth of the statements that letter contains. I am of opinion,' he observed, 'that this letter cannot be read.'¹²⁹

"In *Bank v. Delafield*,¹³⁰ it was said: 'We can see no ground upon which the letter is admissible. It is not in the nature of a declaration which the defendant admits by not answering, nor is it on the same plane as an oral

¹²⁵ *Tufts v. City of Charlestown*, 70 Mass. 537. ¹²⁸ 3 C. & P. 103.

¹²⁶ *Pierce v. Goldsberry*, 35 Ind. 317.

¹²⁹ *Hill v. Pratt*, 29 Vt. 119.

¹²⁷ 13 Am. and Eng. Ency. of Law, p. 259.

¹³⁰ 126 N. Y. 410.

declaration to the same effect, made in the presence of the party to be charged, and who may be regarded as admitting its truth by failing to deny it. This letter is a mere declaration of the writer, assuming in his own behalf to characterize and determine the nature of a past transaction, and it does not demand an answer, and is not admissible in evidence against the defendant.' ¹³¹

"To this, however, there is an important apparent exception, namely, that the receipt of a statement of account by a person and holding the same without objection, is an admission that the statement is correct, and this may be shown against him as a so-called account stated, or admission that the account is *prima facie* correct." ¹³²

Privity. Not only is a person bound by the admissions which he has himself made, but also by the statements of all persons with whom he was in privity at the time such statements were made. Privity has been defined as "mutual or successive relationship to the same property rights." Thus an heir is bound by the admissions of his ancestor, with reference to the title derived from such ancestor, whenever the admissions are such that they would have been received in evidence against the ancestor. ¹³³

§ 29. Admissions by Agents. A principal is bound by the statements of his agent made while attending to the business of the principal and within the scope of the authority conferred upon him. ¹³⁴ A person is bound by the statements of one to whom he has referred another for information upon a matter in which he is interested, this being in substance an agency for the purpose of furnishing the information. ¹³⁵ Upon this principle of agency is based the familiar rule that when a conspiracy has been shown, then whatever has been said or done by any one of the conspirators is admissible against all of them on the ground of joint liability. . Thus it has been said:

¹³¹ *Learned v. Tillotson*, 97 N. Y. 1; *Talcott v. Harris*, 93 N. Y. 567; *City of Chicago v. McKechney*, 205 Ill. 467.

¹³² *Shepard v. Bank of Missouri*, 15 Mo. 143.

¹³³ *Greenleaf, Evidence*, § 189.

¹³⁴ *American Fur Company v. United States*, 27 U. S. 358.

¹³⁵ *Chapman v. Twitchell*, 37 Me. 59.

“When evidence is once given to the jury of a conspiracy, against *A*, *B*, and *C* whatever is done by *A*, *B*, or *C* in furtherance of the common criminal object is evidence against *A*, *B*, and *C*, though no direct proof be given that *A*, *B*, or *C* knew of it or actually participated in it. . . . If the conspiracy be proved to have existed, or rather if evidence be given to the jury of its existence, the acts of one in furtherance of the common design are the acts of all; and whatever one does in furtherance of the common design, he does as the agent of the co-conspirators.”¹⁸⁶

With reference to admissions by agents, or servants, perhaps the most difficult case is that in which it is sought to bind a party to a suit by a statement made by some person supposed to be representing him, as a part of the transaction which is in dispute. It has already been noted that all matters which are so intimately connected as to form a part of the same transaction are said to be comprehended within the *res gestæ* and to be admissible in evidence. This includes in all cases the statements made by the actors in the transaction. If such actors are themselves parties to the suit as against them, there can be no question of the admissibility of their statements. When, however, it is sought to bind a party to a suit by the statements made by a person other than such party, the primary question is one of agency, and is whether the person making the statement was expressly, or impliedly, authorized to represent the party to the suit in the transaction, whether at the time such statement was made he was engaged in the business so authorized by his principal or master, and whether the statement concerned such business. If so, then the statement is binding upon such principal or master if made contemporaneously with the transaction and forming a part of it.¹⁸⁷ If made later and while the person making it is not engaged in the transaction for his master or principal, then it becomes a mere narrative of a past event and can no longer be considered as an admis-

¹⁸⁶ *R. v. O'Connell*, 5 St. Tr. N. S. 1, 710, quoted II Wigmore, Evidence, 1281.

¹⁸⁷ *Fogg v. Child*, 13 Barb. 246; *Golden v. Newbrand*, 52 Ia. 59.

sion binding upon the principal. The rule applicable to this class of cases is well illustrated in a suit by a servant to recover for personal injuries from his employer, in which it was sought to bind the employer by admissions made by his foreman, and the court said:

"The plaintiff, in making out his case, was allowed to testify, against the objection of defendants, that Weber (the brew-master and foreman of the brewery where the accident occurred, who also worked with the men,) came to see him at his house, while he was confined to his bed, some time after the injury, and said that he forgot to throw out the clutch; that he was a man short and forgot all about it, and that he had so much to do he left the rice-tub and forgot to throw it out of gear. Plaintiff was also allowed to prove by another witness that after the accident Weber told him that plaintiff got hurt in the ricetub, and that he forgot to turn off the machinery while plaintiff was in there. If what an agent does binds his principal, and is, therefore, admissible in evidence, what he says about the act while he is doing it is also admissible as characterizing or showing the nature of the act. A declaration made concurrently with the act and constituting a part of the *res gestæ* is admissible in evidence, but where it is a mere narration in regard to a transaction already passed, it does not bind the principal, and cannot be proved.¹³⁸ Undoubtedly the jury would understand that the alleged admissions of Weber were binding upon the defendants as evidence that the injury resulted from his negligence, and it was error to admit the testimony. The evidence would only be competent as affecting the credibility of Weber as a witness, after a proper foundation had been laid by calling his attention to the time and place of the alleged statement."¹³⁹

§ 30. Offers of Compromise Not Regarded as Admissions. Public policy favors the avoidance of litigation and for this reason every person is permitted to attempt to "buy his peace" without liability of having his offers of

¹³⁸ Greenleaf, Evidence, § 113; 1 Phillips, Evidence, 201; Story, Agency, § 134; Chicago, Burlington & Quincy Railroad Co. v. Lee, 60 Ill. 501; Phenix Ins. Co. v. La Pointe, 118 Ill. 384; Pennsylvania Co. v. Kenwood Bridge Co., 170 Ill. 645.

¹³⁹ Baier v. Selke, 211 Ill. 518.

compromise admitted in evidence against him.¹⁴⁰ It must, however, appear from the nature of the transaction that the offer was made as a matter of compromise and it was at one time the practice to state specifically that it was made without prejudice, but the modern rule is that if the offer is clearly a matter of compromise it will be presumed to have been made without prejudice without expressly so stating.¹⁴¹ If, however, during negotiations for a compromise any independent facts which relate to the controversy are admitted, such admissions may be shown unless it is clear to the court that these admissions would not have been made except as a part of the proposed compromise.¹⁴²

It is elementary that if part of an admission be shown, the rest of the statement containing it must be shown, at least so far as it tends to qualify or explain the part introduced, and this is true whether the admission is oral or in writing. Unless an admission is formal so as to operate as a technical estoppel, as, for instance, an admission under seal at common law, the person against whom it is offered may always attempt to rebut or explain it. In fact, it is sometimes said that admissions form an unsatisfactory sort of evidence.¹⁴³ This statement must, however, be taken with considerable allowance when it is considered in connection with convincing a jury, especially when the admissions are in writing.

§ 31. Confessions. An admission of guilt by the defendant in a criminal case is called a confession. The term confession is, therefore, a much more limited one than admission, a confession being, as stated above, a particular kind of an admission. Confessions in respect to their legal effect are either voluntary or involuntary. A voluntary confession is one made without hope or fear induced by the promises or threats of a person in authority over the prose-

¹⁴⁰ *Higgins v. Shepard*, 182 Mass. 364.

¹⁴¹ *Webber v. Dunne*, 71 Me. 331; *Sherer v. Piper*, 26 Ohio 476.

¹⁴² *Stanford v. Bates*, 22 Vt. 546; *Matthews v. Farrell*, 140 Ala. 298.

¹⁴³ *Jones*, *Evidence*, § 295.

cution, and is always admissible. All other confessions are regarded by the law as involuntary and inadmissible in evidence. Persons in authority within the sense of the definition include at least all those who by virtue of official position are able to control the prosecution of the person making the confession. As to whether other persons are to be included the authorities are not uniform, it having sometimes been held that the prosecuting witness is a person in authority within the meaning of the rule. Other courts hold that each case must be decided upon its own circumstances. This rule has been approved by Professor Wigmore,¹⁴⁴ and is based upon the statement of the law by Greenleaf, as follows:

“Promises or threats by private persons not being found so uniform in their operation, perhaps may with more propriety be treated as mixed questions of law and fact; the principle of the law that the confessions must be voluntary being strictly adhered to, and the questions whether the promises or threats of the private individuals who employed them were sufficient to overcome the mind of the prisoner, being left to the discretion of the judge under all the circumstances of the case.”¹⁴⁵

No definite rule can be laid down as to the exact nature of the threat or promise which will exclude in all cases. It has been said that “a threat of corporeal violence is the clearest case of an inducement that may vitiate the confession.”¹⁴⁶ On the other hand, there is no doubt that an unconditional promise of pardon will make a confession involuntary. Between these two extremes, each case must be judged by the nature of the particular promise or threat, as tending or not tending to induce a confession through hope or fear without regard to whether the statements made therein are true or false. The weight of authority is to the effect that the prosecution when offering a confession in evidence must show as a preliminary matter that it was voluntary, but in some jurisdictions its voluntary

¹⁴⁴ Wigmore, Evidence, § 830.

¹⁴⁶ Wigmore, Evidence, § 833.

¹⁴⁵ Greenleaf, Evidence, § 224.

nature is presumed until an attack is made upon it. Under either rule the question as to whether the confession was voluntary or involuntary is for the court upon its admissibility, but in weighing the confession when once admitted, the jury may take into consideration all the circumstances under which it was made. Though an involuntary confession is not admissible in evidence, yet there is no objection to the prosecution making use of the information thereby obtained for the purpose of procuring competent evidence. Confessions procured by deceit or by working upon the religious or superstitious ideas of the accused are regarded as voluntary.

The *corpus delicti* cannot be proven by the confession of the defendant alone, there must be additional evidence thereof. In a case where it was necessary to show that the defendant was above the age of sixteen years in order to convict him of a statutory offense, no further evidence on the point was offered by the prosecution than the confession of the defendant in which he stated that he was forty-four years of age, and the judgment of conviction was reversed for the insufficiency of the proof.¹⁴⁷

ADMISSIBLE DECLARATIONS

Though in the nature of hearsay and not being under the sanctity of the oath for the reason that they are usually the best evidence obtainable, certain classes of declarations have long been held admissible. In such cases it is necessary that the person who made the declaration cannot be produced as a witness, either because of his death, or because of his insanity, or absence from the jurisdiction. In this last case, however, it would seem that an attempt to take his deposition should be shown. The ordinary classification of such declaration is (1) dying declarations as to cause of death; (2) testimony in a previous trial between the same parties; (3) declarations in reference to pedigree; (4) declarations of a testator as to the contents of a lost will; (5) declarations against interest; (6) declarations

¹⁴⁷ *Wistrand v. People*, 213 Ill. 79.

made in the ordinary course of business or professional duty; (7) declarations as to public or general rights.

§ 32. **Dying Declarations.** This exception relates only to prosecutions for homicide,¹⁴⁸ in which it is permitted to show whatever statements were made by a person since deceased, for whose homicide the prosecution is had, after hope of recovery was abandoned to show the cause of death. Such declarations may be either oral or in writing and their compliance with the requirements mentioned above is a preliminary question for the court. In respect to this it has been said:

“The rule as to these declarations is generally treated as an exception to the hearsay rule, but since it existed before the hearsay rule it is in the nature of a qualification or extension rather than an exception. It is difficult to give any reason that is entirely satisfactory for the admission of such declarations. The most satisfactory reasons which can be given for the admission of this class of evidence are, *first*, that the solemnity of the circumstances under which such statements are given dispenses, in a way, with the necessity of making them under oath, and, *secondly*, the impossibility, in many cases, of producing better proof of the homicide makes it necessary that these declarations be admitted in order that those clearly guilty may not escape punishment. As to the first reason, Woodcock’s case lays down the general principle on which dying declarations are admitted. It is there stated that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone; when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. Again, in another early case, it is stated that the principle upon which this species of evidence is received is, that the mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel, by a solemn appeal to God on oath. The declarations of a person dying, under such circumstances, are considered as equivalent to

¹⁴⁸ *Daily v. New York & New Hampshire Ry. Co.*, 32 Conn. 356.

the evidence of the living witness upon oath. As to the second reason it is said: 'But, however unsatisfactory such evidence may be, the necessity of the case has always induced the courts to admit it. There would be the most lamentable failure of justice, in many cases, were the dying declarations of the victims of crime excluded from the jury'."¹⁴⁰

Dying declarations may be impeached in the same ways as the evidence of the deceased could have been if alive and testifying.¹⁵⁰

§ 33. Testimony on a Previous Trial. The testimony of a deceased witness given on a former trial between the same parties may always be shown where the matters in dispute are substantially the same. The same motive and need for cross-examination must have existed in the former suit. Upon this point the Supreme Court of Illinois has recently said:

"Section 163a of the sixteenth edition of Greenleaf on Evidence, which was enlarged and annotated by Prof. Wigmore in 1899, reads in part: 'As to the parties, all that is essential is that the present opponent should have had a fair opportunity of cross-examination. Consequently a change of parties which does not affect such a loss does not prevent the use of the testimony, . . . as, for example, a change by which one of the opponents is omitted or by which a merely nominal party is added. And the principle also admits the testimony where the parties, though not the same, are so privy in interest, . . . as, where one was an executor or perhaps a grantor, . . . that the same motive and need for cross-examination existed.' This paragraph is not in the original text of Greenleaf but is added by the annotator. If this paragraph is read as laying down the rule broadly that a fair opportunity for cross-examination by the party against whom the evidence is offered is all that is necessary to render it admissible, then the overwhelming weight of authority is against the accuracy of the rule as stated; but if it is read, as no doubt its author intended it should be, as stating the rule that a mere nominal change of parties is of no consequence provided the parties in the second action

¹⁴⁰ Elliott, Evidence, § 334.

¹⁵⁰ Nordgren v. People, 211 Ill. 428.

are so privy in interest with those on the former trial that the same motive and need for cross-examination existed, then the rule stated is in accord with the great weight of authority."¹⁵¹

What such testimony was, may be shown by the evidence of a stenographer who reported it refreshing his memory by the use of his notes, or by the testimony of any person who heard the witness testify, refreshing his memory by means of any memoranda available for that purpose. Wherever the stenographer and his notes can be produced it is probable that the testimony must be proven by them, upon the theory that the best evidence of which the case in its nature is susceptible must be produced, and this is especially true where by statute there is an official stenographer whose notes are made evidence. A bill of exceptions containing the testimony is ordinarily not admissible, as the report therein contained may be simply the version of the testimony, or an abstract thereof made by one of the parties to the suit.¹⁵²

§ 34. Pedigree. The term pedigree as used in the law of evidence includes all matters of family relationship and descent, including age, dates of birth, and death. Declarations made by a deceased person,¹⁵³ a member by blood or marriage¹⁵⁴ of the family whose pedigree is the subject of inquiry, are admissible so far as relevant, provided they were made before any dispute arose in reference to the matter.¹⁵⁵ Such declarations may have been made by word of mouth or embodied in documents or inscriptions.¹⁵⁶ Statements coming within the foregoing rule are admitted because of necessity owing to the fact the events in dispute are often remote in point of time, and without depending upon such statements no information could be had.¹⁵⁷

¹⁵¹ *McInturff v. Ins. Co. of North America*, 248 Ill. 92.

¹⁵² *Kankakee R. Co. v. Horan*, 131 Ill. 288.

¹⁵³ *White v. Strother*, 11 Ala. 720.

¹⁵⁴ *DeHaven v. DeHaven*, 77 Ind. 236.

¹⁵⁵ *Elliott v. Peirsol's Lessee*, 26 U. S. 328.

¹⁵⁶ *Inhabitants of North Brookfield v. Inhabitants of Warren*, 82 Mass. 171.

¹⁵⁷ *Copes v. Pearce*, 7 Gill. 247.

Further, the statements are of such a nature that they are likely to be the truth. In stating the theory of the admissibility of such statements it has been said:

“Declarations in the family, descriptions in wills, descriptions upon monuments, descriptions in bibles and registry books, all are admitted upon the principle that they are the natural effusions of a party who must know the truth and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth.”¹⁵⁸

It was formerly held with some strictness that the person making the declaration must have been related by blood to the person whose pedigree is in question, but the present rule admits declarations of a husband as to his wife's family, and of a wife as to her husband's family, and the dissolution of the marriage does not affect the admissibility of declarations subsequently made. The information, however, must be such as was personally known to the declarant or derived from persons competent as members of the family in question to be declarants, and it may be merely a family tradition constituting hearsay upon hearsay,¹⁵⁹ but the relationship of the declarant must be established as a preliminary to the introduction of the declaration.¹⁶⁰ Though there seems to be some dissent the weight of authority is, that declarations of members of the family of the father of an illegitimate as to his illegitimacy may be received, and the authorities are uniform that such declarations by members of the mother's family may be received.¹⁶¹ A witness may always testify as to his own age and whether such testimony is regarded as really hearsay and given under the pedigree rule, or as original evidence it is always admissible.¹⁶²

§ 35. Declarations of a Testator. If a will has been lost

¹⁵⁸ *Whitlocke v. Baker*, 13 Ves. 514

¹⁵⁹ *Van Sickle v. Gibson*, 40 Mich. 170.

¹⁶⁰ *Green v. Normont*, 5 Mackey 80.

¹⁶¹ *Champion v. McCarthy*, 228 Ill. 87.

¹⁶² *People v. Batz*, 115 Cal. 132.

the declarations of the testator may be used to prove its contents. The proof of the execution of a will, however, must conform to the requirements of the statute authorizing its probate and cannot be made by such declarations.

§ 36. Declarations Against Interest. The declarations of a deceased person made against his pecuniary or proprietary interest and where he is shown to have had personal knowledge and no interest to falsify, are admissible. In such a case the declarant must have had the interest at the time he made the statement sought to be introduced, and it is also necessary to show that he either had personal knowledge of the facts or was in a position where it was his duty to know them, in which case there is a permissible inference of knowledge on his part. The declarations may be either written or oral. The fact that there are living witnesses who might testify as to the facts embodied in the declarations does not render them inadmissible. Ordinarily the declarations must have been made before the controversy in which they are offered arose, but it has been held that if the circumstances are such that the declarant had no probable motive for falsification, they may be admitted.

§ 37. Declarations in Ordinary Course of Business or Professional Duty. When a statement is made from personal knowledge by him during the ordinary course of his business or professional duty, and at or near the time of the fact recorded, such statements are admissible as evidence of the facts therein contained, regardless of whether they are against the interest of the declarant or not. Such declarations most frequently consist of entries in account books or other records, but may be made orally.

§ 38. Declarations as to Public or General Rights. The difficulty of obtaining other evidence, together with the improbability that a false statement in reference to a public or general right would long remain uncorrected, has led the courts to admit declarations by deceased persons in reference to such rights. If the right is clearly public then the declaration of any deceased person is admissible, while if it is only a general right common to a considerable number

of persons then it must appear that the declarant had knowledge, or means of knowledge, at first hand concerning the matters in question. In the United States the rule has been so far extended as to permit such declarations when made in reference to purely private rights in respect to boundaries. Many of the instances, however, in which such evidence has been admitted as to private boundaries have related to declarations made by surveyors since deceased, and such declarations were also no doubt competent as being made in the course of business or professional duty and admissible under the class previously discussed. Under this rule ancient maps have frequently been admitted in evidence to prove both public and private boundaries. In all such cases the declarations must have been made before the controversy in which they are offered arose.

OPINIONS OF WITNESSES

§ 39. General Cases. The witness is ordinarily not permitted to state his opinion, conclusion, or inference, as to what he has observed, it being his function to state the facts, and for the triers of the facts to draw inferences therefrom. Thus in a recent case where the question to be determined was whether there had been a parol assumption of a mortgage debt, the court said:

“In determining the question of assumption we are obliged to analyze more closely and comprehensively the character and probative value of Pusheck’s testimony because of the exercise of less care by examining counsel than should have been exerted in the examination of this witness. In the examination the effort should have been to ascertain what was said by the parties—Benton and Pusheck—respectively, on the subject in question, rather than toward obtaining the witness’ conclusion or inference as to Benton’s state of mind upon the question or the witness’ conclusion as to the result, after they were through, of his negotiations or conversations with Benton. It may be that owing to lack of recollection the very language used by the parties in conversing could not have been obtained; but, if that were so, then the substance of the remarks made

should have been elicited. When a witness does remember the language used, the substance is not competent; and before resorting to the substance it should be ascertained whether the witness recalls the language itself. If a witness can remember neither the language used nor the substance of what was said by either of the respective participants in a conversation as to which he is called upon to testify, then no testimony of that witness is competent to charge either of the participants, in respect of what was then said, as upon a promise or agreement. Judgments by courts cannot be predicated upon the conclusions or inferences drawn by a witness, from what has been said, as to what has been promised, agreed, or assumed, by another, if objection is made, nor upon a witness' imagination in that regard, however honest the witness may be. In determining upon rights and liabilities it is only the recollections of witnesses that can properly influence the courts. In a legal controversy it is the function of the court—not of the witnesses—to draw the conclusions and determine whether anything has or has not been 'assumed', 'promised', or 'agreed' in a particular conversation involved, after the court has heard the testimony as to the language, *verbatim* or in substance, that was used by the parties respectively. A rule that witnesses should inform the court what, in a conversation, a party had 'assumed', 'promised', or 'agreed' and that the court, by its judgment, should charge parties accordingly would be an absurdity. In *Ram on Facts*, page 230, is to be found an interesting incident in this connection which occurred in a celebrated trial in 1858. Counsel asked the question of a witness: 'Did you go as a spy?' The Chief Justice, Lord Campbell, interposed, saying: 'You had better get the facts from him, and you can draw any inference you please.' In objecting the Attorney General then said counsel has a right to inquire minutely into all the witness has said or done, but he has no right whatever to put a question that embodies his own characterization or description of something. 'The question being insisted upon, the Chief Justice, after consulting with the other learned judges, Chief Baron Pollock, Mr. Justice Erle, and Mr. Justice Crowder, held that the question was irregular and improper 'not on the ground that the witness is called on to criminate himself, and may refuse to answer, but on the ground that he is called upon to draw an inference from the facts.' '' 163

163 *Wood v. Williams*, 153 Ill. App. 56.

Occasional rulings of the courts cannot easily be reconciled with the general principles sustained by the weight of authority. Thus the question, "Did you authorize anyone to sign that for you?" though calling for a conclusion, has been held unobjectionable.¹⁶⁴ Also in a recent case an affidavit for a continuance stated that "there was plenty of time between the conversation and the time the traveler (or derrick) started to run in which the traveler would have been fastened," and upon objection that this was a conclusion, the court said:

"We do not so regard it, and do not see any substantial difference between the statement as given and giving the time between moving the traveler and the time necessary to fasten the traveler."¹⁶⁵

In some instances, however, the witness is from the very nature of the circumstances better able to state the inference, than the triers of the facts would be to deduce it from any description he would be able to give, and he is then permitted after detailing the facts to give his conclusions therefrom. The facts or phenomena may be "so numerous or so evanescent that they cannot be stated or described in such language as will enable persons not eye witnesses to form an accurate judgment in regard to them and as to which, therefore, no better evidence than such an opinion can be obtained."¹⁶⁶ It is upon this ground that a witness may, for instance, testify that a person appeared to him to be intoxicated, or though not an expert, give his opinion as to the sanity of another. Many other instances of matters coming under this exception will be found. One of the most common is testimony of a witness to handwriting where he has seen a person write, though it may have been but once, or where he has, in the course of business transactions, had occasion to see what purported to be the handwriting of another.

Perhaps the most important exception to the general rule

¹⁶⁴ *Com. v. Kepper*, 114 Mass. 278.

¹⁶⁶ *Reynolds*, Evidence, p. 61.

¹⁶⁵ *Casey v. Kelly-Atkinson Co.*, 240 Ill. 416.

is in the case of so-called expert testimony. Whenever the subject under investigation is of such a nature as to require special study or experience to understand it, then the opinion of a person possessing special knowledge or experience is deemed better than the inference which might be drawn by the tribunal, and is permitted to be given. Such a witness is known as an expert, and his opinion may be given in answer to a hypothetical question embodying and assuming the state of facts which counsel propounding the interrogatory considers proven upon his theory of the case; or from an observation by the witness of the matters forming the basis of his opinion, he having first detailed such observations.

§ 40. Expert Testimony. As suggested above, when a subject is such that it cannot be mastered without special study or experience, then persons having given it such study or having had the necessary experience are permitted to give their opinions in evidence when material to the issues. The nature of the subject as to whether it requires special study and experience and qualifications of the witness as an expert form preliminary questions for the court, and after determining that the subject is a proper one for an opinion, the witness is first interrogated as to his study and experience, and upon this point the testimony of other witnesses may be received, though not frequently offered. In a case where the trial court had permitted a number of physicians to testify as to whether or not the wounds found upon the body of the deceased were such as would likely have been inflicted upon a person while living being struck by a railway train running at the rate of thirty-five miles per hour, the reviewing court said:

“We are of the opinion this evidence was improperly admitted. It is negative in its character, anticipated the defense, and is not competent as opinion or expert testimony. The subject of the proposed inquiry was a matter of common observation, upon which the lay or uneducated mind is capable of forming a correct judgment. In regard to such matters experts are not permitted to state their

conclusions. In questions of science their opinions are received, for in such questions scientific men have superior knowledge and generally think alike. Not so in matters of common knowledge.¹⁶⁷ 'Whenever the subject matter of inquiry is of such a character that it may be presumed to lie within the common experience of all men of common education moving in the ordinary walks of life, the rule is that the opinions of experts are inadmissible, as the jury are supposed in all matters to be entirely competent to draw the necessary inferences from the facts testified of by the witnesses.'¹⁶⁸

"As a general rule, the opinions of witnesses are not to be received in evidence merely because such witnesses may have had some experience, or greater opportunities of observation than others, unless such opinions relate to matters of skill and science.¹⁶⁹ An expert cannot be asked whether the time during which a railroad train stopped was sufficient to enable the passengers to get off,¹⁷⁰ or whether it was prudent to blow a whistle at a particular time.¹⁷¹

"Nor can a person conversant with real estate be asked respecting the peculiar liability of unoccupied buildings to fire.¹⁷²

"The opinions of witnesses should not be asked in such a way as to cover the very question to be found by a court or jury.¹⁷³ Where the matter inquired about requires no special knowledge, and may be determined by a jury upon a sufficient description of the facts in regard to it, it is not proper to receive the testimony of experts.¹⁷⁴ The probable effect of taking all the stakes from one side of a car loaded

¹⁶⁷ *Milwaukee and St. Paul Ry. Co. v. Kellogg*, 94 U. S. 469.

¹⁶⁸ *Rogers on Expert Testimony*, § 8; *Ohio and Miss. Ry. Co. v. Webb*, 142 Ill. 404.

¹⁶⁹ *Robertson v. Stark*, 15 N. H. 109; *Marshall v. Columbian Ins. Co.* 7. *Fost.* N. H. 157; *Protection Ins. Co. v. Harmer*, 2 Ohio (Warden), 452; *People v. Godine*, 1 Denio 281; *Westlake v. St. Lawrence Ins. Co.* 14 Barb. 206; *Smith v. Gugerty*, 4 Barb. 614; *Folkes v. Chudd*, 3 Doug. 157; 1 *Smith's Lead. Cas.* (5th Am. ed.) 630; *Daniels v. Mosher*, 2 Mich. 183.

¹⁷⁰ *Keller v. Railroad Co.*, 2 Abb. App. Dec. 480.

¹⁷¹ *Hill v. Railroad Co.*, 55 Me. 438.

¹⁷² *Mulry v. Ins. Co.*, 5 Gray 541.

¹⁷³ *Chicago and Alton Railroad Co. v. Springfield and N. W. Railroad Co.*, 67 Ill. 142.

¹⁷⁴ *Hopkins v. Indianapolis and St. L. Railroad Co.*, 78 Ill. 32; *City of Chicago v. McGiven*, Ill. 347; *Pennsylvania Co. v. Conlan*, 101 Ill. 93.

with lumber, being a matter of the operation of natural laws within the observation of everybody, is not a matter for expert testimony.”¹⁷⁵

Hypothetical Questions. It having been settled that the expert may testify, he is most frequently interrogated by means of a hypothetical question, namely, a question which assumes the truth of certain facts and calls for an opinion based upon such assumption. After the assumption of the hypothetical question is stated the expert is first asked whether or not he has an opinion, and if the answer is affirmative, is then asked what the opinion is. It is obvious that in many cases the hypothetical question must necessarily be lengthy, but an objection as to its length will ordinarily be sustained if, in the opinion of the trial court, it is unnecessary. The assumptions of the question must be of facts which the evidence in the case proves or tends to prove, but the assumptions may be based upon any theory of the case which the evidence fairly tends to support and the adversary of the party propounding the hypothetical question may, upon cross-examination, assume facts which he deems to have been omitted, or elaborate his own theory of the case. Whether the facts assumed in a hypothetical question are sufficiently established by the evidence is a question for the jury, it being a preliminary question for the court whether the evidence tends to prove such facts.¹⁷⁶

The expert may also base an opinion upon an examination which he has personally made of the subject matter, first, detailing in his testimony the facts disclosed by such examination. The better rule, however, is that he cannot base an opinion upon the evidence of witnesses whom he has heard testify. The correct rule has been stated as follows:

“It is complained that Dr. Strum, a witness for the appellee, was allowed to state his opinion as a medical

¹⁷⁵ *Hughes v. Richter*, 161 Ill. 409; *Hellyer v. People*, 186 Ill. 550.

¹⁷⁶ *C. & E. I. E. R. Co. v. Wallace*, 202 Ill. 132; *Rogers, Expert Testimony*, (2d. ed.) § 27.

expert not based on a hypothetical state of facts, but, in part, upon the testimony of the appellee as a witness, as the doctor heard and construed her testimony. A physician or a surgeon who has treated a patient may express an opinion as to the physical condition of such patient based on information gained while so administering professionally for the affliction, or a physician may testify as an expert from information obtained from a physical examination of the person who is the subject of the inquiry. If the opinion of a physician is desired on the case made or claimed to be made by the testimony produced on the hearing, he should not be permitted to state his opinion based on the conclusion arrived at by himself as to the case made by the evidence as he heard it and gave it weight. The proper course is to state hypothetically the case which the party producing the witness thinks has been proved and to ask an opinion based on such hypothetical case. The jury, who are the judges as to what has been proven, may then apply the opinion of the expert, if in their judgment the state of case on which it was based has been proven. To permit the expert to base an opinion on the testimony as he construes and has weighed it, would be to permit him to exercise the functions of the jury, and, in a sense, decide the whole issues for them."¹⁷⁷

Weight of Opinions of Experts. The expert witness is frequently as much of an advocate of the party for whom he is called as is the attorney who propounds to him the questions calling for his opinions. In view of this, and of the further consideration that he is merely expressing an opinion upon which it is difficult, if not impossible, to assign perjury, the courts do not look with great confidence upon the opinions of experts. Mr. Jones, in his work on Evidence, has collected a number of expressions of different courts:

"It has been said of expert testimony: 'It is not desirable in any case where the jury can get along without it, and is only admitted from necessity, and then only when it is likely to be of some value.' 'The evidence of experts is of the very lowest order and the most unsatisfactory character.' All testimony founded upon opinion merely is weak

¹⁷⁷ Pyle v. Pyle, 158 Ill. 289; Grand Lodge v. Weiting, 168 Ill. 408.

and uncertain, and should in every case be weighed with great caution. 'The unsatisfactory nature of such evidence is well known. The facility with which great numbers of witnesses may be marshalled on both sides of such a question, all calling themselves experts, and each anxious to display his skill and ingenuity in detecting the false or pointing out the true, and equally honest and confident that his own theory or opinion is the only correct one, and yet all on one side directly opposing all on the other, admonishes us of the fallibility of such testimony, and of the great degree of allowance with which it must be received. Such evidence should be received with great caution by the jury and never allowed except upon subjects which require unusual scientific attainments or peculiar skill. The evidence of witnesses who are brought upon the stand to support a theory by their opinions is justly exposed to a reasonable degree of suspicion. They are produced, not to swear to facts observed by them, but to express their judgment as to the effect of these detailed by others; and they are selected on account of their ability to express a favorable opinion, which there is great reason to believe is in many instances the result alone of employment, and the bias arising out of it. Such evidence should be cautiously accepted as the foundation of a verdict; and it forms a very proper subject for the expression of a reasonably guarded opinion by the courts.' We might quote from many other judicial decisions in which the courts have held it proper to caution the jury in somewhat similar language as to the inherent weakness of expert testimony."¹⁷⁸

§ 41. Handwriting. As already suggested, proof of handwriting may be made by the opinion of a person not an expert provided he has become familiar with such handwriting, either by having seen the person who is alleged to have written it, write, though but once, or by having been engaged in correspondence with such person, or having seen this writing in the usual course of business. The weight of such testimony is for the tribunal, and the question of the knowledge of the person upon the subject either a preliminary one or to be brought out in detail upon cross-examination. It is, of course, always competent to prove

¹⁷⁸ Jones, Evidence, § 391.

the writing by any person who saw it written. Upon these matters there is little, if any, conflict of authority. But upon the question of whether such proof may be made by comparison of the disputed writing with other writings by experts there has been much conflict.¹⁷⁹ If an admittedly genuine writing is already in the case as evidence, the weight of authority permits a comparison between the genuine writing and the disputed one, and upon such comparison an expert on the subject of handwriting may give in evidence his opinion. Undoubtedly it follows that in all such cases the jury may also make a comparison, though this has sometimes been disputed.¹⁸⁰ In fact, there could be no very feasible way of preventing them from doing so.¹⁸¹ By statute in many States and by judicial decision in a few, writings shown to be genuine may be introduced in evidence for the sole purpose of comparison, but their genuineness must be very clearly shown.¹⁸² Experts are frequently called to testify as to alterations and upon other questions as to the genuineness of writings, and this is generally regarded as a legitimate field for expert testimony.

¹⁷⁹ *Stitzel v. Miller*, 250 Ill. 76.

¹⁸⁰ 3 Wigmore, Evidence, § 2002 *et seq.*

¹⁸¹ See *Supra*, footnote 179.

¹⁸² *University of Illinois, Spalding*, 62 L. R. A., note.

LAW OF EVIDENCE

PART II

CHAPTER II

DOCUMENTARY EVIDENCE

A document "is any substance having any matter expressed or described upon it by marks capable of being read."¹ Papers of all kinds which contain information material to the issues being tried, may be admitted in evidence subject to the limitations hereafter noted, and are known as documentary evidence. Papers read in evidence have been held to include photographs or skiographs produced in evidence on a trial before a jury.² It is obvious that in many instances such as those of conveyances of property, evidence of this kind is not only frequently necessary, but of the highest importance. Documents may be classified according to their nature, as public, public and private, and private.

§ 42. Public Documents. Whenever a record is kept by a public officer in pursuance of the duties of his office as prescribed by law, such record is public in its nature and the information which it contains is the exclusive evidence of the matters recorded. Being kept by a public official in the course of his duty and under his oath of office, the public is bound by the recitals of such record, so long as it remains unimpeached. Records kept by public officers outside of the scope of their duties prescribed by law are not entitled

¹ Stephen, Evidence, Art. 1.

² C. & J. Elec. Ry. Co. v. Spence, 213 Ill. 223.

to this dignity, are not public records, and have no more weight than if kept by a private person.

§ 43. Public and Private Documents. Some records are from their nature, when kept by the officer designated by a class of persons, binding upon all the members of such class as though they were public records, but have no such effect in respect to persons not comprehended within the class. Such, for instance, are the records proper of a corporation which are binding upon all members, but not upon persons outside the corporations. These may be called public and private records, though strictly speaking, as will be seen later, they are private records.

§ 44. Private Documents. Those documents which do not affect the public at large, but whose binding character is limited to the parties to such documents, are called private documents. A contract, for instance, is binding only upon the parties thereto and those in privity with them, and is called a private document. If proper regard is had to the contractual relations of such persons and to the matter of privity, it will be seen readily that because as a matter of substantive law apart from any question of the law of evidence, a person may be bound by a document of which he has no personal knowledge, there is no substantial distinction between this and the class which we have denominated public and private documents, as in that class the person sought to be bound must be connected with the record or document by some contractual or privital relationship, so that it is not necessary to make, as a matter of principle, any distinction other than that between public and private documents and records. A private document non-contractual in nature is binding, and usually of importance only as to its admissions, unless it is admissible as a declaration under rules previously noticed.

§ 45. Distinctions. A public document is binding upon all persons. A private document is binding only upon such persons as may have placed themselves in such a relationship with the makers thereof as to be bound by it as a matter of substantive law. The public document may always

be proven by a copy and should be proven in this way, the public interest requiring that the original be kept by the proper custodian accessible to the public at all times. Private documents may in certain instances be proven by copies, but ordinarily the original must be produced.

§ 46. Statute of Frauds. By the Statute of Frauds certain classes of contracts are required to be evidenced by a note or memorandum thereof in writing signed by the party to be charged or by his duly authorized agent. A discussion of the classes of contracts embraced within the statute and of the various requirements thereunder will be found in another article in this work. There is only to be pointed out here that if the statute is not waived by failure to plead it in making up the issues in a case, or otherwise rely upon it in accordance with the practice of the court in which the cause is being tried, then in order to prove the contract the note or memorandum prescribed by the statute must be introduced in evidence. Ordinarily as a preliminary to an objection to oral evidence in proof of such a contract, the defense of the Statute of Frauds must be pleaded and made one of the issues in the case, otherwise an objection to oral evidence upon this ground will be overruled. The rules of pleading should be consulted.

§ 47. Copies of Public Documents. Any public document may be proven as a matter of common law by an examined copy. This is also sometimes called a compared copy, or a sworn copy. Its production in evidence is always accompanied by the testimony of a witness or witnesses that it has been examined or compared with the original and is a true copy.³ Its correctness is thus always evidenced by the testimony of at least one witness, and to a great extent this method of proof has been superseded by the use of certified copies of public documents authorized by various statutes as being a much more convenient method of proof. Certified copies are those the correctness of which is authenticated by the custodian of the originals in a form prescribed by the law of the forum. Statutes in respect to

³ *Lynde v. Judd*, 3 Day 550.

certification usually require that the seal of the public body whose record is certified be affixed in addition to the signature of the custodian. At common law when the contents of a copy were authenticated by the Great Seal of State, the result was what was known as an exemplified copy. The term was gradually extended to all copies authenticated by seals of a State or of courts, of which seals the forum in which the copy was offered in evidence would take judicial notice, all such copies being known as exemplified copies. In modern practice in the United States many certified copies are thus also exemplified copies. A true exemplified copy deriving its force from the common-law effect of a seal apart from some statute authorizing a particular form of certification is comparatively rare. In some courts a so-called office copy of their own records identified by an informal memorandum or notation of the custodian, is used, but such use is local and not of general importance. The only difference between an office copy and the ordinary certified copy is in the more informal character of the certificate accompanying the former.⁴

Statutes authorizing certification frequently extend their provisions to records of such bodies as private corporations and must be consulted for exact information as to when certified copies may be used. It is also frequently provided that original private documents, such as conveyances of real estate, the execution of which has been certified by a public officer, may be introduced in evidence without further proof of execution than the certificate of such officer appearing upon the instrument. A typical statute upon the subject of certification is that of the United States in reference to the authentication of acts of legislatures and the proof of the records and judicial proceedings of State courts, which reads as follows:

“Section 905. The acts of the legislature of any State or Territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such State, Territory, or country affixed thereto.

⁴ *Elwell v. Cunningham*, 74 Me. 127.

The records and judicial proceedings of the courts of any State or Territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the Judge, Chief Justice, or Presiding Magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken.”⁵

It will be seen that the provision in reference to authentication of acts of legislatures is a true exemplification, while the provision in respect to judicial proceedings requires a double certificate accompanied by a seal, and to that extent at least, approximates an exemplification. In practice under the second part of this statute a third certificate is frequently added in which the clerk of the court certifies as to the official character of the judge signing the second certificate, but this third certificate is apparently technically superfluous as being outside the language of the statute. From its general use and the familiarity of courts and officials with the triple form it probably cannot be easily abandoned.

§ 48. Copies of Private Documents and Other Secondary Evidence Thereof. If the original of a private document can be produced, the person relying upon it as evidence must produce such original. To this rule there are certain exceptions. Such are when the document is not in the possession of the party desiring to use it, when it has been lost or destroyed, or from the nature of the case is immovable. If the original is in the possession of the opposite party to the suit, one of two courses must be pursued. The party desiring the production of the original may, if he has in his power satisfactory secondary evidence of the contents of the original, simply serve notice upon his opponent to produce the original at the trial and that in default of such production, secondary evidence will be offered. Upon this

⁵ III Fed. Stata. Anno. p. 37.

notice having been served a reasonable time before the trial, and it appearing that it sufficiently identifies the document required, the court will, upon proof of the notice and that the document is in the hands of the party upon whom it was served, permit secondary evidence if the original is not produced. The party refusing or failing to produce the original after such notice and proof, will thereafter be barred from offering it in evidence himself upon the trial. The proof by secondary evidence must be the best of which the case in its nature is susceptible. If there are in existence copies they must be produced or proper efforts to obtain them shown. If a copy is produced it may be shown to be correct by the testimony of any witness who knows such to be the fact, or by circumstantial evidence. The admissions of a party as to the contents of an instrument—being merely secondary evidence—unless made formally as a part of the proceedings, cannot under some decisions be used to prove its contents unless the production of the original is excused under one of the foregoing rules.⁶

It frequently happens, however, that for lack of satisfactory proof of contents, the party relying upon a private document prefers as a matter of tactics to compel his opponent to produce the original. Such compulsory production is provided for by statutes in all jurisdictions, which, though differing in detail, in general provide for applications for such production to be made to the court by motion or petition, accompanied by a showing that the document desired is in the possession of the opposite party, is material to the issues, and its production necessary for a trial of such issues. Upon such showing the court enters an order requiring the production of the documents asked for. In some jurisdictions penalties for failure to produce upon such an order are prescribed by the statute authorizing the order. In others the production is enforced by a contempt proceeding against the party failing to produce the document. The same result in modern practice may be attained by procuring the issuance of a *subpœna duces*

⁶ *Prussing v. Jackson*, 208 Ill. 94.

tecum and service thereof upon the opposite party, but in jurisdictions where this writ does not issue as a matter of course, the showing to be made to procure its issuance must be the same as for an order for production, and the proceeding is more cumbersome because of the necessity of having the writ issued and served, whereas the order to produce is self executing.

The United States Statute in reference to production of documents is as follows:

“Section 724. In the trial of actions at law, the courts of the United States may, on motion and due notice thereof, require the parties to produce books or writings in their possession or power, which contain evidence pertinent to the issue, in cases and under circumstances, where they might be compelled to produce the same by the ordinary rules of proceeding in chancery. If a plaintiff fails to comply with such order, the court may, on motion, give the like judgment for the defendant as in cases of nonsuit; and if a defendant fails to comply with such order, the court may, on motion, give judgment against him by default.”⁷

This statute it will be seen contains a penalty for non-compliance. A typical State statute without penalty is that of Illinois, which reads as follows:

“The several courts shall have power, in any action pending before them, upon motion and good and sufficient cause shown, and reasonable notice thereof given, to require the parties, or either of them, to produce books or writings, in their possession or power which contain evidence pertinent to the issue.”⁸

Such statutes are designed to and in practice do supersede the common-law practice by which the court was authorized to grant a rule on the plaintiff to produce the documents, or to give the plaintiff a copy when the production was necessary to enable him to declare against the defendant. They also obviate in most instances the necessity of bills of discovery in equity, the method of produc-

⁷ III Fed. Stats. Anno. p. 2.

⁸ Hurd's Stats., 1908, C. 51, § 9, p. 1060.

tion and discovery under the statutes being much more expeditious and convenient. These former remedies are, however, probably not abolished by the statutes.⁹

If the original of the document desired is in the possession of a third person who is within the jurisdiction of the court, it is necessary that a *subpoena duces tecum* be issued and served upon him requiring him to produce such original. If this process is properly issued and served and proves unavailing, secondary evidence may then be received. If such third person is without the jurisdiction of the court and by its practice his deposition may be taken, then an attempt must be made to secure the original by means of such deposition. Some courts, however, hold that a mere showing that the person who has possession of the original is outside the jurisdiction of the court, is sufficient to authorize secondary evidence. A full discussion of this question is contained in a recent case in the Supreme Court of Illinois in which it is said:

“In some jurisdictions the rule is, that where it appears that an instrument in writing is beyond the jurisdiction of the court and in the hands of a third party a copy thereof may be introduced in evidence in lieu of the original; while in other jurisdictions the rule is, that a copy cannot be admitted in evidence in lieu of the original unless it appears, in addition to the facts that the original is beyond the jurisdiction of the court and in the hands of a third party, that due effort has been made by the party offering the copy to obtain the original.¹⁰ The rule in force in this State,¹¹ requires that due effort must be made by the party who offers a copy of a written instrument in evidence—when the original is beyond the jurisdiction of the court and in the hands of a third party—to obtain the original before the copy will be received in evidence. In the Dickenson case a copy of a deed was offered in evidence, which the proof—which was in the form of an affidavit—tended

⁹ Swedish Am. Tel. Co. v. Casualty Co., 208 Ill. 567.

¹⁰ 2 Elliott, Evidence, §§ 1469, 1470; 25 Am. & Eng. Ency. of Law, (2d ed.) p. 171.

¹¹ Dickenson v. Breeden, 30 Ill. 279; Fisher v. Greene, 95 Ill. 24; Bishop v. American Preservers' Co., 157 Ill. 284.

to show was in the hands of the plaintiff's grantor in the State of Indiana. The court held that the plaintiff should have taken the deposition of his grantor and not have relied upon a copy of the deed. In the Fisher case the party who held the original power of attorney resided in the State of New York, and, upon his deposition being taken, refused, upon request, to attach the instrument to his deposition, and it was held that upon such refusal a sworn copy of the power of attorney annexed to the deposition of another witness was properly received in evidence. And in the Bishop case, on page 307, it was said: 'Secondary evidence may be offered to prove the substance of a document which it is out of the power of the party to produce; and this rule applies to papers out of the jurisdiction of the court, provided due effort be made to obtain such papers.'

"We think the rule in force in this State the sounder one of the two rules above mentioned, as under the rule in force in Alabama and some other States it is only necessary to introduce proof that the deed, contract, or other instrument in writing relied upon is in the hands of a third party outside of the State, to entitle a copy thereof to be admitted in evidence. In the Dickison case, on page 187, it was said: 'There is much danger in allowing the introduction of copies . . . without fully establishing the fact of the existence, at some time, of an original and of its subsequent loss or destruction, so that after diligent search it could not be found. . . . Justice and the safety of the people require a rigid rule to be applied and enforced in such cases.' We think it clear the trial court followed the rule established in this State, and that it did not err in refusing to admit in evidence the copy of said agreement." ¹²

If the original has been destroyed or lost, secondary evidence is permissible. In case of destruction, the fact must be satisfactorily shown. In case of loss a diligent search must be shown in all places where the original might be. It will not be sufficient to have testimony embodying the conclusion that the search was diligent, but facts in reference thereto must be given so that the court may infer that the search was diligent. "The rule is, in order to let in secondary evidence of the contents of a written instru-

¹² McDonald v. Erbes, 231 Ill. 295.

ment, the person in whose possession it was last traced to must be produced unless shown to be impossible, in which case search among his papers must be proved, if that can be done. At all events, search must be made for the paper with the utmost good faith, and be as thorough and vigilant as if the rule were that all benefit of the paper would be lost unless it be found.¹³ In certain classes of cases the use of a copy is always permissible from the necessity of the case, the original being immovable. Such, for instance, are inscriptions upon buildings or monuments, which from their nature cannot be removed. The question as to what is the original of a telegram has been frequently discussed. The better rule is, that the original is the message delivered to the operator where the person to whom it is sent takes the risk of transmission or employs the telegraph company, but where the person sending the message employs the telegraph the message delivered to the addressee is the original.¹⁴ If the message is incorrectly transmitted the question becomes one of the law of agency as to whether the telegraph company is such a general agent of the person employing it as to bind him by mistakes in transmission, and upon this there is a conflict of authority more properly discussed in treatises upon the law of agency.

The original is not necessarily that which is first written but rather becomes in law the original from being adopted as such by the parties interested in or making it. Thus it has been held that where observations of a weather bureau were first written upon loose sheets which were then copied into a book by means of a letter press the book and not the loose sheets was the original record, it having been intended as such by the persons keeping the record.¹⁵

§ 49. Books of Account. One class of private documents is of such importance as to demand especial attention. At the common law a party to a suit though not com-

¹³ *Prussing v. Jackson*, 208 Ill. 94.

¹⁴ *Durkee v. Vermont Central R. R. Co.*, 29 Vt. 127.

¹⁵ *C. & E. I. R. R. Co. v. Zapp*, 209 Ill. 340.

petent as a general witness could if the suit involved a book account and he kept no clerk, produce his book of accounts and identify it by his own testimony, and then upon the testimony of some of his customers, that they had settled by the book and found it correct, such book was admitted in evidence to prove the amount, but only, however, where the amounts involved were small. Under modern statutes permitting parties to a suit to be general witnesses in their own behalf, the importance of this exception is less than formerly, but nevertheless, such statutes usually contain provisions for the testimony of a party to his books of account.¹⁶

The rule is uniform that the book to be admissible must be one of original entries; but in cases where the book containing the original entries has been lost or destroyed, secondary evidence may be given. The fact that the entries may have been transcribed from temporary memoranda made upon a slate or other material, does not destroy their character as original entries, provided they were made at or near the time of the transaction. It has been held by some courts that the books must contain mutual charges and credits, but such is not the better rule. Other courts refuse to admit books which are simply a record of money charges, upon the theory that the rule admitting them only applied to prove items of goods sold, or labor and services performed, and that ordinarily a cash transaction will be susceptible of better proof by means of a promissory note or receipt. The tendency has also always been to limit the use of books to small transactions for the same reasons. When entries in the books of account of a party are introduced the opposite party may make use of and introduce any other entries therein contained.

Suppletory Oath. The production of an account book must ordinarily be supplemented by the testimony of some person who has personal knowledge of the truth of the contents. It is not necessary that the person who made the entries shall have such knowledge. For instance,

¹⁶ *Alling v. Brazee*, 27 Ill. App. 596.

in case of sales the salesman may furnish the information to the bookkeeper who makes the entries therefrom. In such a case, it will ordinarily be necessary to produce both as witnesses, also the book to show that the information was correctly given and entered. The rule has been stated as follows:

“In order to entitle a book of account made up of entries transcribed from temporary memoranda to be read in evidence, it has been held that such book must be supported not only by the suppletory oath of the party who made the entries in the book, but that the person who made the temporary memoranda in the first instance—where the entries in both cases were not made by the same person—must also be called to prove that at or about the time the charges were made, articles were delivered or work performed of a character similar to those charged in the book.”¹⁷

The effect of this rule is that the book of itself has comparatively little evidentiary value apart from the testimony of the witnesses who certify by their testimony to its correctness. Inasmuch as this is the case the result is that proof of a book account does not differ materially from any evidence where the memory of witnesses is refreshed by a true record of a so-called past recollection. This subject has already been treated under the head of witnesses.¹⁸

§ 50. Alterations. It has been said that if a document when produced shows upon its face changes or interlineations, the question of its admissibility without explanation depends upon whether they are to be regarded as suspicious from their nature and appearance.¹⁹ Ordinarily such changes will be presumed to have been made prior to the execution and delivery of the instrument in question. But if they appear suspicious the presumption ceases, and the instrument cannot be admitted without satisfactory explanation of the changes or interlineations. Just when the document will be suspicious on its face seems to be a

¹⁷ 9 Am. and Eng. Ency. Law, (2d ed.) 919.

¹⁸ For fuller treatment of Books of Account as evidence see article on Commercial Accounts.

¹⁹ *Laudt v. McCullough*, 206 Ill. 220.

matter to be determined by the court from inspection, and of course if admitted in evidence it is always open to the opposite party to show that the document is different from the one actually executed. The conflict of authority upon the subject of alterations and presumptions arising therefrom is such that local decisions must be consulted for exact information in particular jurisdictions.²⁰

§ 51. Parol Evidence Rule. An instrument contractual in its nature, cannot be varied by parol evidence of matters prior to or contemporaneous with its execution, offered by parties to such instrument or their privies.²¹ The theory of this rule finds its basis in the substantive law of contracts, which conclusively presumes that the negotiations of the parties are merged in the writing, and that this was intended by them as the final and authoritative statement of their agreements. This of course does not prevent third persons from attacking the written instrument by parol testimony of prior or contemporaneous matters, as they are not bound by it unless indeed the question should be as to what was binding upon the parties to the agreement when it is thought the writing must be the exclusive evidence thereof.²² Nor does the rule prohibit the parties themselves from showing that there was fraud, mistake, or duress, which invalidated the written contract or made it voidable.²³ Evidence of all the circumstances surrounding the parties may also be given in order that the court may so far as possible place itself in a position to view the writing as they did,²⁴ for the purpose of arriving at their intention by construction or interpretation and removing any trifling ambiguity. If there is a real ambiguity upon the face of the instrument after seeking all the aids of construction and interpretation, it is void and inadmissible in evidence to bind the parties to it. The court will not by construction make a contract for the parties. If, how-

²⁰ 2 Am. & Eng. Ency. Law, (2d ed.) 272 *et seq.*

²¹ *Seitz v. Brewers' Co.*, 141 U. S. 510.

²² *First Nat. Bank v. Dunn*, 55 N. J. L. 404.

²³ *Paul v. Rider*, 58 N. H. 119.

²⁴ *Reed v. Ins. Co.*, 95 U. S. 23.

ever, the ambiguity is latent, that is an ambiguity arising from matters outside the instrument itself, then parol evidence is admissible to identify the real subject matter. Thus in a contract for the sale of the farm of *A* in Middlesex County, if it appears from matters outside the writing that at the time of its delivery *A* owned two farms in Middlesex County, then it may be shown by parol evidence which farm was intended, the ambiguity being latent or hidden so far as the face of the contract is concerned, it being unambiguous by its terms as to the sale of a farm owned by *A* in Middlesex County. But if the contract purported to sell a farm in Middlesex County by a description, which on the face of the instrument might apply to more than one farm, or which was so indefinite on its face as to make it impossible to locate the farm intended, then the ambiguity is said to be patent, or open and the contract is void for ambiguity.²⁵

Instruments non-contractual may always be contradicted by parol testimony. Such, for instance, are receipts and in general, any instrument not amounting to a contract. The method of making a valid will and the proof thereof is a matter of statutory requirement, and where the statute requires a writing it is of course incompetent to show what the testator intended otherwise than in the manner prescribed by the statute. In reference to matters of explanation of ambiguities and testimony, for the purpose of assisting construction, the rule for wills is the same as that for contracts.

It is to be noted that if the parol contract sought to be shown is independent of the written contract and collateral with it, then its subject matter is not merged in the writing and may be shown.²⁶ If the parol agreement is subsequent it of course cannot be merged and may be shown.²⁷ This is subject, however, to the exception that if the contract in writing is under seal and the parol contract pur-

²⁵ *Bristol v. Orphan Asylum*, 60 Conn. 477.

²⁶ *Platt v. Aetna Ins. Co.*, 153 Ill. 113.

²⁷ *Teal v. Billy*, 123 U. S. 578.

ports to modify it, or would have that effect, and is still executory, it cannot be shown, as the substantive law of contracts prohibits the modification of a sealed contract by a parol executory contract. As to whether a prior or contemporaneous parol contract purporting to be a condition of the written contract is admissible, there is some doubt from the authorities.²⁸ The better rule seems to be that such a condition cannot be shown.²⁹

§ 52. Ancient Documents. When a writing thirty years old³⁰ at the time it is offered in evidence is shown to have been in existence for that length of time and to have come from a custody appropriate under the circumstances, and appears to be free from suspicion on its face is admissible without other evidence of its authenticity. The reason for this rule is the difficulty of making proof of handwriting after the lapse of so great a length of time, and the improbability of the forgery of a document for use so long in advance.

§ 53. Proof of Documents by Attesting Witnesses. At common law if the signature of an attesting or subscribing witness appeared upon a contract, upon the theory that such witness had been chosen by the parties as the medium of proof of its execution and that his information would probably be the best attainable, the rule required that such witness be called to prove execution. The rule did not apply if the subscribing witness was dead, or could not be found, or was without the jurisdiction of the court, or was insane, or incompetent, or otherwise incapable of being produced as a witness.³¹ Exceptions also existed and subscribing witnesses need not be called when the adverse party claimed under the document, or when the contract was thirty years old or more and came from the proper custody, and as it was said proved itself, being regarded as an ancient document. If it was necessary to prove the

²⁸ *Burke v. Delaney*, 153 U. S. 228.

²⁹ *Ryan v. Cooke*, 172 Ill. 302.

³⁰ *Winn v. Patterson*, 34 U. S. 663.

³¹ *Jones*, Evidence, § 528.

execution of a contract, and the production of the subscribing witnesses was excused under any of the foregoing rules, it was necessary to prove the handwriting of such witnesses, and if that could not be done proof must be offered of the handwriting of the person executing the contract.

Under modern statutes in reference to acknowledgements conveyances may be proven by showing compliance with the terms of such statutes. Other statutes expressly limit or set aside the foregoing rules, the usual provision being in effect that it shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and that such instrument may be proved as if there had been no attesting witnesses thereto. By statute attesting witnesses are, save in exceptional cases, required to all wills and in general, proof of wills must be made by attesting witnesses.

§ 54. Photographs and Drawings. Where the original of a document, cannot for some legal reason be produced, and by the rules of evidence a copy is allowed, a photographic copy may be the best evidence which can be produced and more appropriate than any other kind. In such a case the correctness of the copy may be proven in any one of the various ways already discussed, but more usually by the testimony of a witness to its exactness. When the question in issue is, as to the condition of an object or place, a photograph thereof is always admissible upon proof of the correctness of the representation. A drawing or plat may in many instances be more available than a photograph, and is admissible under the same rules. The testimony of the photographer or person who made the drawing should usually be introduced if available, but that of any person who knows that the representation is a correct portrayal of the object or place, at the time in question, will ordinarily be sufficient. Photographs or drawings made at a time remote from that of the matters in issue, will usually be regarded with suspicion, and in order to be admissible should be accompanied by evidence that there had been no change in the object or place portrayed. These rules apply

to X-ray photographs or skiographs which are admissible upon proof in accordance with rules above.³²

§ 55. **Scientific Books—Histories—Newspapers.** So far as the general rule is concerned, it is clear that the statements contained in books and newspapers are ordinarily mere hearsay and not admissible. Of course, if a party to a suit can be so connected with the contents of a book or newspaper as to make it binding upon him as an admission, or to charge him with notice or knowledge, then the rule is no different from that in other cases of admissions, or proof of knowledge or notice, and the printed statements should be admitted in evidence. The general rule is to some extent relaxed as to scientific works where they relate to the exact sciences,³³ as, for example, in tables compiled for computing interest and annuities, and mortality tables. The better rule is, however, that tables involving scientific calculations must be accompanied by evidence of correctness, or by long use in the courts have become established as trustworthy, and evidence of correctness dispensed with for that reason. Almanacs and histories are most commonly used for the purpose of assisting the court in matters of which it takes judicial notice, and apart from this, there is probably no rule in favor of admitting them without proof of correctness.

“As to historical and encyclopedic works most questions are disposed of from the point of view of judicial notice, that is, the court will or will not dispense with evidence of certain notorious facts; while the exception in favor of ancient reputation on matters of general interest will admit many treatises. Apart from these two principles, it is doubtful where there is any general exception in favor of works of history.”³⁴

Dictionaries by standard authors are constantly used in the courts upon the question of definitions of words. Newspaper reports of markets and like matters are sometimes

³² C. & J. Elec. Ry. Co. v. Spence, 213 Ill. 223.

³³ Jones, Evidence, § 578.

³⁴ Wigmore, Evidence, § 1699.

received. It is doubtful, however, whether such evidence is admissible without further evidence that the particular reports were being ordinarily acted upon by dealers, and an inference of their general correctness thus established; or competent evidence of the way in which such reports were compiled sufficient to give rise to an inference of correctness.

It should be noted in this connection that the opinions of experts are frequently the result of study of scientific treatises, or of compilations of facts not made by themselves, and that ordinarily their opinions are not rejected on this account. In a few cases, but not according to the better rule, the expert has been permitted to cite works upon which he relies and where this has been done, such works may be read by the opposite party to show that they do not contain the corroboration claimed by the witness. If as a part of his qualification as an expert the witness states that he has read certain treatises, or if this is brought out on direct examination he may as a matter of course, be cross-examined in such a way as to show lack of familiarity with them and probably with other standard treatises.

§ 56. Judgments. So far as a judgment is the result of litigation between private individuals it is a private document, the record of which is kept in a public way not differing, however, in this respect, from the record of many other private documents such as conveyances. Being kept in a public way the proof of judgments is subject to the same rules as the proof of other public records. Upon certain matters of status the judgment may become a matter of public interest and be binding upon the public at large. The question of the binding effect of judgments is a question of substantive law rather than one of evidence, and special treatises upon Judgments and Decrees, and former Adjudication, should be consulted for further information.

§ 57. Miscellaneous Private Records Made in Usual Course of Business. In many instances records made by private persons may be used in evidence when certified as a

correct record of a past recollection. This subject has already been treated under our discussion of Refreshing the Memory. Any record which was made at or about the time of the transaction in question and can be certified as correct by the testimony of a person who either made it, or at the time it was made had information concerning its making from which he can testify as to its correctness, may be used for refreshing memory and as a matter of substance is admitted in evidence. In certain cases, however, such records have been admitted where there was no witness who could certify to their correctness, the evidence of which is in substance merely a uniform course of business on the part of the person in whose behalf it is introduced, and because in the nature of the case the best evidence obtainable. Thus in a recent case it was said as to certain records of a railway company in reference to its cars:

“The same objections made to the Borner record were also made to the introduction in evidence, on behalf of appellee, of a record or book known as the ‘historical record.’ This was the book in which the railroad company kept a record of its car equipment. It showed the time when, the place where, and by whom, the cars belonging to the company were built, the character of their construction, and to what extent the cars had been repaired or rebuilt. It was testified to by the clerk who kept this record that it was a record of everything in regard to the history of the equipment, both freight and passenger. The witness testified that when a car is built, inspected, and turned out, the inspector sends a statement to the clerk or bookkeeper showing the initials and numbers of the cars. The car works also sends a similar statement. These statements are compared, and if they agree they are entered in the record of equipment, which is the historical record. The memoranda or statements are kept for several years and then destroyed. The technical name of the record is known in the business of the company as the ‘record of car equipment.’ The witness testified that he had been engaged in the employment of keeping this record since 1900, and it was in his handwriting since that time; that the record had been kept since 1876, and the entries in it were con-

tinuous, regular, and uninterrupted; that W. W. Bowman had kept the record before him; that L. S. Van Dyke, who was then dead, was Bowman's predecessor, and the witness identified Van Dyke's handwriting, and that Richard Bratton kept the book before Van Dyke. Bowman was called as a witness, and testified to the correctness of the book while he kept it. Historical records of other railroad companies, similar to that of appellee above described, were also identified and admitted in evidence, over the objection of appellant, for the purpose of showing the history and condition of the cars of these companies which were in the possession of appellee at the time of their destruction by the fire in appellee's yards. In the nature of things it would be well nigh impossible to preserve and produce the original reports from which these records are made up, and it would be impracticable, if they were preserved, to use them as evidence on a trial, as it is apparent that their number must be legion, for a record is made not only of the construction, but of the condition and all repairs made on each car. Moreover, the original evidence of construction and repairs to cars is not within the personal knowledge of any one person. The work done on one car may be done by a number of men and under different foremen, so that an entry by the person having personal knowledge would seem impracticable. These books were offered as aids in arriving at the value of the cars at the time of their destruction. They purported to show the age of the car, its character, and the nature, and amount of repairs made thereto. They were supplemented by the testimony of competent witnesses as to the depreciation in value of cars from age and use. None of this evidence was conclusive, but it was competent to be considered by the jury, together with the other evidence.'"³⁵

It is to be noticed in this connection that every effort must ordinarily be made to produce persons who can certify by their testimony the correctness of the records in question.

³⁵ P. C. C. & St. L. Ry. Co. v. Chicago, 242 Ill. 192.

CHAPTER III

REAL EVIDENCE

It is obvious that so far as the existence or appearance of a document is concerned, the production of the document itself to the tribunal is a species of Real Evidence which will need no special discussion apart from what has already been said in reference to documentary evidence. Whenever the issue involves the existence of any person or object it is, in general, competent to have the person or object inspected by the tribunal. This may be done by the person appearing before the tribunal, or the object being brought in for inspection, but if this is not possible then the tribunal may visit such places as are necessary for the inspection, and as it is said make a "view" thereof. This is sometimes called Natural Evidence. At common law the age of a person was frequently determined by bringing him before the tribunal for inspection, and the same course was adopted with reference to persons upon whom it was charged that mayhem had been committed.¹

Under modern practice it has frequently been successfully objected that such inspections were improper, there being no way of preserving or recording the evidence for review upon writ of error or appeal. Thus it has been said in reference to such a question:

"Defendant in error suggests that the defendant was present in court on the trial and that this together with the confession, was sufficient to justify the jury in finding him to be more than sixteen years of age. The defendant did not take the witness stand except on a preliminary question in reference to the admission of his confession in evidence, and the jury was excluded from the court room while he was testifying on that subject. But whether he did or did not testify, the law does not allow the jury to fix his age

¹ 3 Bl. Comm. 333.

by inspecting his person.² While the appearance of the defendant might be conclusive evidence to the jury, there would be some difficulty in having evidence of that character preserved in the bill of exceptions for the inspection of a court of review. 'To allow a jury to make up their verdict upon a disputed fact from their own individual observation would be most dangerous and unjust.'³

The modern practice permits a person, who has seen another, whose age is in question, to testify as to his appearance and then state his opinion in reference to such age,⁴ and undoubtedly the better rule is, that even if the person is in the presence of the jury his appearance should be described by a witness so that the bill of exceptions may present the matter properly for a reviewing court. This is also true in reference to objects brought before the trial tribunal. This body, from its observations may learn something concerning the objects, while at the same time from the testimony of the witness describing them the matter may be properly recorded for use on appeal or writ of error.

§ 58. Inspection of Personal Injuries. That the plaintiff bringing suit to recover damages for personal injuries may usually exhibit, voluntarily, such injuries to the tribunal, is well settled. The offer to do so must, however, be accompanied by preliminary evidence to satisfy the court that an inspection will not be misleading. Thus an exhibition to the jury of a personal injury may properly be denied where from the lapse of time since the occurrence of the injury, or from other reasons the view of the injury would be improper in the opinion of the court. As to whether the defendant in such a case may compel the plaintiff to submit to an inspection, there is considerable conflict in the authorities, the tendency being to leave it to the sound judicial discretion of the court to compel such inspection when necessary to do justice between the parties,

² *Stephenson v. State*, 28 Ind. 272.

³ *Seaverns v. Lichinski*, 181 Ill. 358; *Wistrand v. People*, 213 Ill. 79.

⁴ 1 *Elliott*, Evidence, § 677.

though the power to do so is strongly denied in some cases.⁵ The court always has discretion to refuse inspection when applied for by either party, when it appears that to permit it would be violative of the rules of decency; or to unduly excite the emotions of the jury without a corresponding advantage from additional information being imparted.

§ 59. Inspection of Articles — Experiments. The production of articles of various kinds comes within the rules above, and is ordinarily permitted when in the opinion of the court such production will assist in trying the issues. When the article produced is a machine it may, if the question is as to its operation, be operated while being exhibited to the jury.

“In a recent case a railroad company was allowed in the trial court to make experiments under practically similar conditions and circumstances to show that a rail could not have injured the plaintiff in the manner claimed. So a physician has been allowed by the use of a pin to demonstrate to the jury upon the plaintiff’s loss of feeling in an action for personal injury, when it was claimed that paralysis had taken place. The same rule has been applied as to other experiments by experts in the presence of the jury. On the same principle operas have been performed in court, and comic songs sung, plagiarized papers have been read, and the so-called materialization of spirits exhibited. Obviously if the experiment is too complicated to afford any fair inference, or if it cannot be performed in such a manner as to fairly illustrate the fact to be found, it should be excluded. In civil cases the courts may require the party to do some physical act in the presence of the jury for the purpose of disclosing identity, or showing the physical health or condition of such person, or his ability to read or write, or the appearance of his handwriting when such matters are relevant to the issue. But the propriety of such an order must usually rest largely in the discretion of the trial court; and it would only be in case of a plain

⁵ Union Pac. Ry. Co. v. Botsford, 141 U. S. 25.

abuse of such discretion that the appellate court would interfere."*

It is to be noted that in a criminal case the trial court will not be permitted to compel the defendant to do anything which might amount to testifying against himself in contravention of the constitutional prohibitions of self-incrimination.

§ 60. View of Land and Other Objects. Statutes usually regulate this subject especially in relation to lands. There is undoubtedly common-law authority for such view apart from the statute to be exercised in the discretion of the court, and the statutes, usually, expressly leave the matter to the discretion of the trial court. It is obvious that when regulated by statute the terms and provisions of the statute must be followed, and that any view by the jury in private, or in a way not authorized by the statute or common law must be rejected.

* Jones, Evidence, § 403.

CHAPTER IV

JUDICIAL NOTICE, PRESUMPTIONS, BURDEN OF PROOF

As previously suggested, evidence is necessary only upon facts which appear to be in dispute from the pleadings taken in connection with the rules of pleading of the court in which the cause is being tried. The amount of evidence necessary may in such cases be dependent upon rules of law in reference to what is known as Judicial Notice, and in reference to Presumptions. Closely connected with these are the rules relating to what is known as the Burden of Proof.

JUDICIAL NOTICE

The parties to a suit are excused from pleading or proving certain classes of facts of a general or public nature, which are, or should be generally known within the jurisdiction of the trial court, and of which as it is said the court takes judicial notice. It is not necessary that the court should have actual personal knowledge of such facts, but may consider such sources of information as are available, or to which its attention is directed by a party to the suit. The result is that a party to a suit relying upon the doctrine of judicial notice, though not required to offer evidence of such facts must often be prepared to direct the attention of the court to sources of information as to the facts asked to be judicially noticed, and in doing so must follow the rules of evidence. The result is, that when a fact is seriously disputed, the fact that the trial court makes it the subject of technical judicial notice is of no great assistance to the party relying upon it. When a fact has been judicially noticed evidence in support of such fact is properly refused, but its admission cannot prejudice the party against whom it is offered and is, there-

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fore, not reversible error. The opposing party may, however, introduce contradictory evidence in which case the jury must determine the fact. The classes of facts judicially noticed are, *first*, those which the law makes it the duty of the court to know, and *second*, those which are of such universal notoriety as to render evidence of them unnecessary. Under the first class is comprehended all the law by which the forum in which the case is tried is to be governed in making its decisions.

§ 61. **Domestic Laws.** Courts in the United States, therefore, judicially notice all Constitutional provisions, International law, Public statutes and the common law of the State in which they sit, Federal Laws, and the Law Merchant. Private statutes of the State in which the court is held must be proved, the statute and common law of other States and countries, all of which is known as foreign laws, must be proved. The proof of foreign laws is, however, not made in the same way as that of other facts but is made to the court, as the basis of an instruction to the jury by the court as to its result. On this point it has been said:

“To establish the law of the State of Indiana with reference to actions of this character, the appellee introduced in evidence before the court, and out of the presence of the jury, certain statutes and reported decisions of the Appellate and Supreme Courts of that State, and it is said by the appellant the action of the court in that regard was erroneous, and it is urged if the law of Indiana is to control, that then the court should have received in evidence said statutes and reported decisions in the presence of the jury, and allowed the jury to determine from the Indiana statutes and reported decisions of the courts of that State the law of that State, and whether under the law of that State, as found by them, the appellee was liable. While there is some conflict in the authorities upon the question, the great weight of authority and the better reason, we think, supports the view that while a foreign law must be proved as a fact, the proof thereof, in a case like this, should be made to the court, and not to the jury. Mr. Greenleaf thus lays down the law upon the subject: ‘The established doctrine

now is, that no court takes judicial notice of the laws of a foreign country, but they must be proved as facts. And the better opinion seems to be that this proof must be made to the court, rather than to the jury.'¹ Mr. Justice Story says: 'For all matters of law are properly referable to the court, and the object of the proof of foreign laws is to enable the court to instruct the jury what, in point of law is the result of the foreign law to be applied to the matters in controversy before them.'''²

§ 62. Governmental and Judicial Matters. All matters connected with the government, and public officers and their functions, will be judicially noticed, as well as the existence of such foreign governments as have been recognized by the government of this country with their flags and seals of state. So also the courts take judicial notice of their own organization as a part of the governmental system. They further notice the territorial divisions of their own States made for civil and political purposes.

§ 63. Geographical and Historical Facts—Art and Science. The important geographical and historical facts of its own country will be judicially noticed by a trial court. Those principles of art and science which are so well established as to have become a part of common knowledge will be judicially noticed. The cases upon this subject present an almost infinite variety of subjects which have been judicially noticed, and but very little can be done in laying down general rules. Frequently the question of judicial notice has not arisen until the case reached an Appellate tribunal. Often the question is one for the discretion of the trial court, which discretion will not be reviewed except in case of clear prejudice. Where by statute or express rule of law, it is made the duty of the court to take judicial notice of a matter, such rule must of course be followed. Where it is merely a matter of

¹ 1 Greenleaf, Evidence, § 486; 1 Thompson, Trials, § 1054; 13 Am. & Eng. Ency. of Law (2d ed.) p. 1071; *Bank of China v. Morse*, 168 N. Y. 458, 61 N. E. 774, 56 L. R. A. 139, 85 Am. St. Rep. 676; *Pickard v. Bailey*, 26 N. H. 152.

² *Christiansen v. Graver Tank Works*, 223 Ill. 142.

precedent the cases are so various as not to call for an extended discussion which would only amount to a list of decisions.³

PRESUMPTIONS

In the law of evidence a presumption is an inference permitted, or required to be drawn from the proof of a given state of facts. These presumptions are established by rules of law setting forth the evidence required in particular cases, in order that certain inferences may legally arise.

“A rebuttable presumption means a rule of law that courts and judges shall draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of such inference is disproved.”⁴

Thus from proof of the unexplained absence of a person from his home for seven years the law permits the inference, or so-called presumption that he is dead, and there is said to be a presumption of death. Looked at from the point of view of classic definition, the presumption in such a case is the rule of law establishing the quantum of evidence which is necessary to give rise to the inference.

§ 64. Prima Facie Presumptions. By far the greater number of presumptions are *prima facie* or rebuttable. Thus in the presumption of death above referred to, if one party had put in sufficient evidence to show the unexplained absence for seven years, he would be entitled to rest upon that point as having made a case from which the jury would be instructed that as a matter of law they might infer death. But his opponent might offer any evidence tending to show that the person in question was still alive and thus rebut the presumption.

§ 65. Conclusive Presumptions. In a small number of cases from the proof of a given state of facts, the law infers or presumes another, and will not permit any con-

³ Wigmore, Evidence, § 2580.

⁴ Stephen, Evidence, Art. I.

tradition. Thus from proof that a person is under the age of seven years, the law makes the conclusive inference that he lacked criminal capacity and any further evidence of his guilt is inadmissible.

§ 66. **Presumptions of Law and of Fact.** If a presumption has been so continuously recognized by the courts that a rule of law can be said to be established, in reference thereto, it is said to be a presumption of law. If not, it is a mere inference or presumption of fact which may be argued, but upon which the court will not instruct the jury as to the amount of evidence necessary. In many cases it is difficult to say whether a presumption has been sufficiently recognized to have become one of law, and some writers include certain inferences among presumptions of law, which are rejected by others. If an inference may logically be drawn, it is frequently not of great importance as to its formal recognition as a presumption of law, unless there is involved a question of Burden of Proof. The questions of whether there is a presumption and the nature and limits of the rule of law creating it, are not matters properly treated in a work on the law of evidence. Such presumptions are matters of substantive law, and should more properly be discussed in the different branches thereof.⁵

§ 67. **Presumptions Created by Rules of Evidence Arising from the Withholding, Suppression, Fabrication, or Spoliation of Evidence within Control of Party to Suit.** Some presumptions, however, belong to and are created by the rules of evidence. Thus a party to a suit is presumed to be willing to produce all evidence in his possession or under his control, and relevant to the issues being tried if it would be favorable to his contention. If then he fails to produce, or suppresses, or withholds, such evidence the presumption naturally is that he considers such evidence unfavorable and the law authorizes the further presumption that it is unfavorable. The maxim *omnia præsumentur contra spoliatores* has long expressed the

⁵ Stephen, Evidence, Introduction, III.

rule applicable as against one who mutilates or destroys a document pertinent to the issues. The mere withholding of such a document gives rise to the unfavorable presumption, and after notice to produce from his opponent such withholding, entitles such opponent to introduce secondary evidence of the contents of the document, and debars the holder from using the document to dispute the correctness of such secondary evidence. It is obvious that the suppression or fabrication of oral testimony will on principle have the same effect. A party is bound to produce such witnesses as might have information when because of their relationship to him as being members of his family, or his employes, or being similarly related, they are presumptively favorable to him, and at least in a sense constructively within his control. When it appears that such persons are not produced by the party who would naturally be expected to produce them, the unfavorable presumption against him arises, but may be rebutted by showing unavailing efforts to produce them because of absence properly accounted for, or because of hostility, or by showing that they were equally available for the other party, and evidence for the purposes of such rebuttal is always competent.⁶

Res Ipsa Loquitur. Another presumption which perhaps belongs more to the domain of evidence than that of substantive law, arises in negligence cases where the thing concerning which the negligence is charged is shown to be under the exclusive control of the defendant. In such a case evidence of the happening of the event charged to be negligence, gives rise to a presumption of negligence and makes a *prima facie* case for the plaintiff. The illustration of this principle most frequently given, is that of a passer by upon a street being injured by the fall of an object from the window of an adjoining building,⁷ in which case negligence is permitted to be presumed from evidence of the control of the window by the defendant and of the fall of the article in question. The principle is also applied

⁶ Warth v. Loewenstein & Sons, 219 Ill. 222.

⁷ Byrne v. Boadle, 2 Hurl. & Colt. 722.

in suits against common carriers for injury to, or loss of goods being carried, or injury to passengers, the proof of the relation of carrier and shipper, or passenger, and of the loss or injury, being regarded as sufficient to justify the presumption or inference of negligence upon the part of the carrier.⁸ If, however, specific acts of negligence are charged they must be proven as alleged and the proof will not ordinarily be helped by the presumption of *res ipsa loquitur*, which is available only under a charge of negligence in general terms, the permissible presumption being that of negligence generally, and not of any specific negligent act or omission.⁹ The presumption arising from the rule of *res ipsa loquitur* places upon the opposing party the burden of rebutting it. Concerning this it has been said:

“When an unusual and unexpected accident happens, and the thing causing the accident is in one’s exclusive management, possession, or control, the accident speaks for itself, is itself a witness, *res ipsa loquitur*, and in a suit by any one having an action therefor, the fact of the accident puts on the defendant the duty of showing that it was not occasioned by negligence on his part.”¹⁰

It has frequently been held that the doctrine of *res ipsa loquitur* has no application in suits against a master by servants, to recover for negligence in performance of his duties for their protection, while in his employ.¹¹ This exception is based upon the theory that the happening of an accident to the servant may just as well have resulted from a risk assumed by the servant or through the negligence of a fellow servant as from the negligence of the master.¹² Occasional cases expressly or in effect hold that

⁸ North Chicago Street Ry. Co. v. Cotton, 140 Ill. 486.

⁹ Chicago City Ry. Co. v. Carroll, 206 Ill. 323; Chicago City Ry. Co. v. Barker, 209 Ill. 329.

¹⁰ Case of The William Branfoot, 48 Fed. Rep. 914, quoted in Hart v. Washington Park Club, 157 Ill. 16.

¹¹ Omaha Packing Co. v. Murray, 112 Ill. App. 233; Schultz v. Chicago Telephone Co., 121 Ill. App. 573; Northern Pac. Ry. Co. v. Dixon, 139 Fed. Rep. 737.

¹² Diamond Glue Co. v. Wietzychowski, 227 Ill. 342.

the general rule is equally applicable to cases between master and servant; local decisions should be consulted.¹³

BURDEN OF PROOF

§ 68. Obligation on Plaintiff. The party to a suit who has the affirmative of a disputed matter of fact, is said to have the burden of proof upon that subject. In general, the plaintiff has the burden of proof wherever he would fail in his suit if no evidence were offered.

“The best tests for ascertaining on whom the burden of proof lies are, *first*, to consider who would succeed if no evidence were offered on either side; and *secondly*, to examine what would be the effect of striking out of the record the allegation to be proved, bearing in mind that the *onus* must lie on whichever party would fail if either of these steps were pursued.”¹⁴

It is obvious that when making the first of these tests it is necessary to take into consideration what facts if any will be judicially noticed, thus relieving the party from the obligation of proving them, and second, what if any presumptions exist from the state of the record at the time the question of burden of proof arises. Such presumptions will be known from the substantive law of the particular case, and will frequently determine where the burden of proof lies. Frequently this is, however, not a true burden of proof, but the burden of proceeding with evidence. The term “Burden of Proof” is used in a double sense. It has a primary meaning and also a secondary meaning. In its primary and true sense, it means the duty of establishing one’s case. In its secondary sense it means the duty of going forward with evidence. In the former sense it never shifts. In the latter sense it may shift repeatedly during the trial.¹⁵ Where the evidence necessary is peculiarly within the knowledge of the opposite party he is expected to produce it. The most frequent example of

¹³ *Chenall v. Palmer Brick Company*, 117 Ga. 106; *Coleman v. Mechanics Iron Foundry*, 168 Mass. 254; *Armour v. Golkowska*, 95 Ill. App. 492; *Johnson v. Met. St. Ry. Co.*, 104 Mo. App. 588.

¹⁴ *Reynolds, Evidence*, § 73.

¹⁵ *Hughes, Evidence*, 15.

this is found in cases where licenses from some public authority are required and the burden is placed upon the person holding and claiming under the license to produce it.

It will thus be seen that in general, the burden of proof rests upon the plaintiff, provided anything remains to be proven in order to establish his case. In this event he has the right to open and close the case, but the rule as to proceeding with evidence on his part may quickly be satisfied because of the existence of some disputable presumption in his favor which may require his opponent to proceed. It is to be noted that even if there are no disputed facts as to the elements which constitute the plaintiff's right of action, yet if he claims unliquidated damages, the burden is upon him to show such damages and he has the right to open and close. Frequently, under pleas of set-off or similar claims the defendant is practically the plaintiff in a cross action, and if he admits the plaintiff's cause of action and there is no question of unliquidated damages, he will have the right to open and close.

§ 69. Limitations upon the Number of Witnesses. In the trial of a cause each party is endeavoring to convince the jury that his contentions as defined by the issues are correct. It is obvious that so far as consistent with the rule that permits the court to exclude those matters which would tend to unduly delay the progress of the trial, the parties have a right to call as many witnesses as in their own judgment will be of assistance in convincing the jury. If, however, a fact though disputed by the pleadings is not disputed in the evidence, or is collateral to the main fact or facts in issue, it is well settled that the court may in its discretion limit the number of witnesses. Upon the main facts in issue it is doubtful whether the court has the right to interfere by such a limitation. Where the testimony consists of the opinions of experts a limitation is frequently made; and also in cases where witnesses are called for the purpose of impeaching the credibility of a witness by testimony as to his general reputation for truth and veracity.¹⁶

¹⁶ *Green v. Phoenix Ins. Co.*, 134 Ill. 315.

CHAPTER V

INTRODUCTION OF EVIDENCE

The introduction of evidence as a practical matter must be carefully planned in advance with a view to presenting it in such a way as to best convince the tribunal. The usual advice is to follow the sequence of time, and there is no doubt that save in exceptional cases this is the best plan, it being not only easier for the attorney but more readily followed by the jury. Much care is necessary in preparation to see that the salient facts are likely to be brought out. In this connection it is to be noted, that counsel because of his familiarity with such facts may overlook the length of time which he spent in becoming familiar and understanding some which are best known to himself, and minimize their importance, or the difficulty of properly presenting them as a part of the case. It is thus of great advantage in important cases to have the advice of associates in preparing evidence for trial.

§ 70. Documentary Evidence. All documents should be carefully arranged in chronological order. If originals are lacking care should be taken to see that copies are correct and certified, or exemplified copies—when such are to be used—should as well as others be carefully compared with the originals, so that it may be certain that no surprises will take place on the trial on account of erroneous copies. If deemed advisable to secure an order for production or a *subpœna duces tecum*, care should be taken to have all preliminary steps taken in due season. If notice to produce is considered advisable it should be served in time to give the opposite side an opportunity to search for and procure the documents. The papers to be introduced in evidence should be offered in their logical order as a part of the general scheme of presenting the case.

In identifying a paper by the testimony of a witness care should be taken not to characterize it, except as being marked as an exhibit with a number, and by the names of the parties, with date. To do otherwise, as to refer to it as a contract or agreement, does no good and frequently leads to objections which waste time and disconcert the witness. When identified the paper is reserved until the witness has left the stand, and is then offered in evidence and submitted to the opposite side for examination, preliminary to such objections as may be made. If admitted the document is then read to the jury by counsel offering it, unless such reading is waived. As a matter of tactics it should always be read if important, to impress the jury with its terms unless it should be so lengthy as to tire them, when if agreed to by counsel only important parts need be read.

§ 71. Testimony of Witnesses. Witnesses should be carefully examined in advance of the trial. Upon the trial they will undoubtedly be asked whom they have talked with about the case, and they should be assured at the time of the preliminary examination in the office of counsel, that not only is such preliminary examination highly proper, but that the court would regard it as a ground for reprimanding counsel, that they had placed upon the stand witnesses without ascertaining in advance the knowledge which they had upon the issues. This preliminary conference with the witness should be sufficiently thorough to disclose completely his information upon the subjects in hand, and the sources of such information. It also gives counsel an opportunity to become acquainted with any peculiarities of the witness and his general intelligence and disposition, and thus to avoid what might be sources of trouble on the trial. If the statement of the witness is to be reduced to writing in narrative form and signed by him, it is best, so far as possible to have this statement in his own handwriting. The legitimate preliminary examination of a witness is of course not to be in any way connected with any effort to have him shade or change his testimony, a highly improper and criminal matter.

§ 72. **Direct Examination.** The conduct of the direct examination of witnesses is a much more difficult matter than ordinarily supposed. To avoid questions which are objectionable as leading, and still direct the attention of the witness to the matters in hand and bring out all the information desired from him, requires skill and careful preparation. Counsel must be alert to recognize points of advantage, and to know when he has gone far enough. His questions must not assume matters not yet in evidence, nor are they ordinarily permitted to call for the conclusion or opinion of the witness. When such an opinion is permitted to be given by one who has qualified as an expert witness, then care must be taken in framing whatever hypothetical questions are necessary so that their import may be understood by the jury, as well as by the witness, and the examination become more than a mere ceremony. Ordinarily, counsel should be well enough prepared to know the case without reference to notes. Otherwise the examination drags, the jury becomes weary, and the result is not favorable.

§ 73. **Cross-Examination.** So far as the permission to use leading questions is concerned the cross-examination is much more easily conducted than the direct examination. The objects of cross-examination are (1) To destroy or weaken the testimony of the witness. (2) To bring out facts favorable to your side of the dispute. (3) To discredit the witness. Unless there is some reasonable ground to anticipate that one or more of these things can be done cross-examination is worse than useless, as the opposing side has the benefit of the additional impression made upon the jury by the story of the witness being told the second time. It is an excellent rule that counsel must at least have a well grounded suspicion of being able to bring out something favorable, or otherwise should refrain from cross-examination. If, however, from his knowledge of the case he knows that the witness is not telling the truth he should use every effort to bring out his mistake or perjury by cross-examination. As to how this should be done no

general rule can be laid down, each case depending upon its own circumstances. If an attempt is to be made to impeach the witness by proof of prior inconsistent statements, care should be taken to lay the foundation therefor upon cross-examination by asking him whether he made the statements in question, calling his attention at the same time to the place, time, and persons, in whose presence made; or if the statements were in writing, showing him the writing.

§ 74. Re-Direct Examination. Whatever new matter has been brought out by cross-examination and is susceptible of explanation by the witness, is the proper subject of a re-direct examination, and the witness should at that time be given an opportunity to set himself right upon any matters which have been made doubtful by the cross-examination.

§ 75. Variance. When the evidence offered does not correspond with the allegations in the pleading of the party offering it, either express or implied by the rule of pleading, a variance is said to exist and under the rules heretofore stated the evidence is inadmissible. Under the strict rules of ancient common law, amendment of pleadings, was either not allowed or was permitted only infrequently. Under modern statutes the tendency is towards great liberality in permitting amendments, and they are usually allowed practically as a matter of course if application is made in apt time. The common-law rule, however, required that only the substance of the issue be proven and this resulted in much discussion as to what constituted such substance. This is no longer important, the modern rule requiring merely that the cause of action or defense be supported by some evidence, and being further strict in its requirement that objections on the ground of variance be made promptly, and in such specific form, as to apprise the opposite party definitely of the variance of which complaint is made, so that he may have an opportunity to apply for leave to make an amendment if he so desires.

The modern rule in effect is, that a party to a suit can-

not plead one thing and prove another, if prompt objection is made by his opponent, but upon such objection being presented the rule permits him to make amendments often even after verdict, to bring about the necessary correspondence between his pleading and proof.¹ The statute of amendments must be consulted for the exact rules followed in particular jurisdictions. The party offering evidence must be prepared by a complete familiarity with such rules to take advantage of his rights in this respect, although it should be seen to in advance of trial, that pleadings are so prepared as not to afford an opportunity for such an objection except in accidental cases.

§ 76. The Attorney as a Witness. By his connection with the subject matter of a suit, an attorney frequently becomes possessed of information which renders it important for him to be a witness at the trial. As soon as it becomes known to him that he is likely to be needed as a witness, an attorney should withdraw as counsel as though not absolutely disqualified as a witness, because of being an attorney in the case, his testimony is looked upon with suspicion and the practice of an attorney testifying and also appearing as advocate is strongly condemned by the courts.²

CONCLUSION

In closing, the words of one of the greatest masters of this subject may properly be quoted as summarizing the most important principles of the law in respect to the production of evidence:

“I will leave aside any question of changing the jury system, and assume that it is to be in no degree restricted. Undoubtedly, at least, in my opinion, it will long continue and should continue, to a greater or less extent. So long as it does, we must have a law of evidence, that is, a set of regulative and excluding precepts, enforced by the presiding officer of the meeting, namely, the judge. In exercising this function, the court must continue to apply certain great principles, such as these: (1) That the jury must, as far as possible, personally see and hear those whose state-

¹ Lathrop v. Godfrey, 8 Hun 739.

² Frear v. Drinker, 8 Pa. St. Rep. 521; Onstott v. Edel, 232 Ill. 208.

ments of fact, oral or written, they are asked to believe; (2) that witnesses must, so far as possible, testify orally, publicly, under strong sanctions for truth telling, and that both parties must have full opportunity to examine or cross-examine, under the court's supervision; (3) that in the case of writings, the jury must, so far as possible, personally and publicly inspect such as they are expected to act upon; (4) that whatever is said or shown to the jury or privately known to them, bearing on the case, must be said, shown, or stated publicly, in the presence of the court and of all parties concerned; (5) that the execution of solemn documents must be clearly shown, and that they must be faithfully construed according to the written terms; (6) that the jury must not be obliged or permitted to listen to what will unduly delay the case, or too much tend to confuse, or mislead them; (7) that the jury may be aided by the opinions, on matters of fact, of persons specially qualified, wherever they are likely to be materially helped by it; (8) that the court must have power to review and set aside the verdict of the jury, in order to prevent gross injustice, and secure conformity to the rules of law and the requirements of sound reason . . . in no case substituting its own judgment for that of the jury, and always exercising a merely restraining power."³

³ James Bradley Thayer, *Preliminary Treatise on Evidence*, p. 535.

ACTIONS AT LAW AND SUITS IN EQUITY

CHAPTER I

THE ADMINISTRATION OF LAW

The law becomes an active social force only through its practical application to the conduct and affairs of men. Ordinarily, this practical application is made by the people of the State themselves, by moulding their conduct to conform with the rules of action established by the State. A large part of the municipal law in the English and American systems, consists of the unwritten or common law, which has its foundation largely in the customs of the people. How is the citizen to inform himself of these customs which he is required to obey? In general, everyone acquires a knowledge of custom as fast as there is need of having that knowledge. A man can hardly live in an organized community without knowing how other men act, that is, what custom is. In general, he knows what to do and what not to do as well as what to wear and what not to wear. No one needs to be told that he must not injure the person of another, or take his property, or break his own contracts. But cases arise in which men honestly differ as to what ought to be done, that is, as to what custom does require. When a man is honestly ignorant concerning any matter, the natural recourse is to some person or persons likely to be better informed than he. Thus in the earliest forms of society if there was a dispute between different members and that dispute was not settled by fighting, the oldest and most respected members of the tribe who had had the largest experience in life were

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called upon to settle it. The same thing is done today. The judges of the courts take the place of the chiefs of the savage tribes. Blackstone speaks of this and says:

“But here a very natural and very material question arises: How are these customs and maxims to be known, and by whom is their validity to be determined? The answer is, by the judges in the several courts of justice. They are the depositaries of the law, the living oracles, who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land. Their knowledge of that law is derived from experience and study, and from being long personally accustomed to the judicial decisions of their predecessors.”¹

Not only is it sometimes difficult to ascertain the custom or unwritten law on a certain subject, but written laws are frequently complicated and vague as to their true meaning, and before they can be thoroughly understood by all of the people they must be interpreted; hence, it is necessary that there should be some body or court in authority to interpret them.

But the law needs more than to be declared, for very often men refuse or neglect to do what they well know they ought to do, and for the law to become vital and practical it must have sanctions or penalties which must be enforced. Part of the constitution of a court is the presence of an officer of the law, as for example, the sheriff, who may command the whole power of the State to execute the mandate of the court. Hence, from early times courts have been and still are the source from which the lawyer and the citizen must derive their knowledge of the law and the spirit of obedience to its commands.

§ 1. Courts Defined. A court is a tribunal created by a State to decide controversies concerning legal rights and to prevent, redress, or punish legal wrongs.²

It consists of one or more judges, together with such other officers as clerks, sheriffs, jurors, and the like, as may be necessary for the transaction of its business accord-

¹ Bl. Comm. 69.

² Bl. Comm. 23-25.

ing to law.³ Its authority is derived with us either from a constitutional provision or a statute, by which its powers are created and defined.⁴ The judge alone is not the court, for the court exists as such only when its necessary members are assembled and in actual session at the time and the place prescribed by the constitution or the statute creating the court and defining its powers. Before a court can give a valid judgment there must be jurisdiction of the cause and of the person. The court can take judicial action only upon a controversy between contesting parties presented to it in due form of law for its adjudication.⁵ Judicial tribunals have existed from the earliest times, having been adopted into Athens from Egypt as early as 1500 B. C., since which time they have been generally introduced throughout the civilized world.⁶

§ 2. Classification of Courts. *Of Record and Not of Record.* In the English and American systems, courts are divisible into "courts of record" and "courts not of record". A court of record is a tribunal exercising judicial functions under an authority from the State and is independent of any personal privilege or official power residing in the magistrate appointed to hold it, proceeding according to the provision of the general law of the land and recording its determinations in official rolls, whose statements impose absolute verity and cannot be contradicted by any evidence nor amended except by the order of the court itself or by a writ of error or an appeal.

A court not of record is a tribunal whose judicial power is commensurate with that of the person appointed to hold it, and of whose proceedings no official record is kept, and whose records are not indisputable but may be examined by tribunals both as to their existence and the truth of their contents.⁷ In England the King's courts were courts

³ Van Slyke v. Trempealeau Co., 39 Wis. 390.

⁴ *Idem*, 39 Wis. 390.

⁵ Callen v. Ellison, 13 Ohio St. 446.

⁶ Wilson, Lectures on Law, pt. 2, ch. 3, p. 201.

⁷ Bl. Comm. pp. 24-25.

of record while the manor courts and the other courts of inferior jurisdiction were courts not of record. In this country, whether a court is a court of record or not depends upon the statute or the constitutional provision to which the court owes its origin. Ordinarily, with us the courts known as Circuit or District courts are courts of record, while examples of a court not of record would be a court of a justice of the peace, and certain municipal and county courts.

Superior and Inferior. Courts are also divided into courts of superior and courts of inferior jurisdiction. A superior court is a court with controlling authority over some other court or courts, and with certain original jurisdiction of its own.⁸ The judgments of a superior court are final and its jurisdiction over all matters upon which it undertakes to act, though not expressed, is presumed until the contrary appears. Inferior courts are those which are subordinate to other courts, or those of a very limited jurisdiction. The judgments of these courts, standing alone, are mere nullities, and in order to give them validity their proceedings must show their jurisdiction.⁹ All courts from which an appeal lies are inferior courts in relation to the appellate court before which their judgment may be carried; but they are not inferior courts in the technical sense of those words.¹⁰

General and Limited Jurisdiction. Another division of courts is that of courts of general, and courts of limited or special jurisdiction. Courts of general jurisdiction take cognizance of all causes, civil or criminal, of a particular nature.¹¹ A court of general jurisdiction, whether named in the Constitution or established in pursuance of the provisions of the Constitution, cannot be directed, controlled, or impeded in its functions by any of the other departments of the government.¹² Controversies of every kind are pre-

⁸ Anderson, Law Dict.

⁹ Kempe v. Kennedy, 5 Cranch (U. S.) 193.

¹⁰ *Ex parte Watkins*, 3 Pet. (U. S.) 193.

¹¹ Kinney, Law Dict.

¹² *Vigo Co. v. Stout*, 136 Ind. 53.

sumed to be within its jurisdiction unless they have been specifically and exclusively entrusted to some other tribunal. The records of such courts import absolute validity and need not contain recitals of the facts upon which the jurisdiction of the court in any case depends.

Original and Appellate. Courts of original jurisdiction are those in which an action has its first source or existence, and in which it may be tried. Such courts do not take jurisdiction of it by appeal. "Original jurisdiction" does not mean exclusive jurisdiction as two or more courts may have original jurisdiction of the same actions.¹³

Courts of appellate jurisdiction are those which review causes removed by appeal or error from another court.¹⁴

Civil and Criminal Courts. Civil courts are courts instituted for the enforcement of private rights and the redress of private wrongs between private persons. Criminal courts are those established for the repression of crimes and for their punishment. In the majority of instances, courts are given both criminal and civil jurisdiction. Frequently, however, especially in the larger cities, certain courts are given exclusive criminal jurisdiction while other courts are organized for the trial of civil actions.

Provisional Courts. In addition to courts established permanently, in times of war provisional courts are established, being made necessary by the circumstances of the case. These provisional courts are established by military commanders and conquered territories pending the return to normal conditions of the State. These are courts of record and may or may not be of general jurisdiction.

§ 3. Jurisdiction of Courts. When a lawyer is employed to bring a suit, the first question to be decided is what court to bring it in. The action must be brought in some court having the power to entertain and determine it. This power is called jurisdiction, which has been defined as the authority to hear and judge a controversy and to carry the judgment into practical effect.¹⁵

¹³ Abbott v. Knowlton, 31 Maine 77. ¹⁵ Withers v. Patterson, 27 Texas 491.

¹⁴ 16 Kinney, Law Dict.

Where a court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding upon the persons and property concerned, in every other court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable but simply void; and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences are considered, in law, as trespassers.¹⁶

Upon What Jurisdiction Depends. Jurisdiction may be dependent upon either the subject of the action or upon the parties to the controversy. Where jurisdiction depends upon the parties, the court cannot exercise jurisdiction over a party unless he be found within the jurisdiction of the court and waive service of process unless, however, he voluntarily appears; for where jurisdiction depends upon the parties, they may waive what is merely a personal privilege and appear in the action. As to the subject-matter, however, jurisdiction may not be conferred by waiver or stipulation, for the parties to the controversy are powerless to impute powers to the court and jurisdiction of qualifications to themselves, not granted by law.¹⁷ Where jurisdiction depends upon the subject it may be determined by the character, the quantity, or the situation of that subject. For example, some courts have criminal jurisdiction merely; to other courts have been given jurisdiction of certain subjects up to a certain value; while to still others, jurisdiction has been granted over property within its geographical limits. Courts of admiralty, for instance, are given power in certain cases over vessels within their jurisdiction, irrespective of personal service upon their owners, and property found within the jurisdiction of the court is very often the basis of a judgment *in rem* even where personal service has been obtained. Thus, where the prop-

¹⁶ *Elliott v. Peirsol*. 1 Pet. 328, 340.

¹⁷ *Kendall v. U. S.*, 12 Pet. 524, 623.

erty of an absconding debtor is found within any territory, it may be attached and sold to pay the debt regardless of personal service.

Where jurisdiction is dependent upon the person it may be stated, as a general rule, that any court may acquire jurisdiction over persons upon whom its process may be lawfully served within the region to which its judicial power extends. And this is true whether the person being served with process be permanently domiciled within the State where he is served, or not.¹⁸

When once the court has acquired lawful jurisdiction, the judgment of the court frequently affects property or persons over which the court has no immediate authority. Thus, as has been shown above, where property is within the jurisdiction of the court a valid judgment concerning that property may be made although the owner be beyond its reach, and the judgment may even deprive the owner of his alleged rights in the property. On the other hand, when once the court has acquired jurisdiction over the person it may affect property although the property be situated without the jurisdiction of the court.¹⁹ More than one court frequently has jurisdiction over the same subject-matter or over the persons of the defendants in a controversy. In such cases it is the rule that the court to which the controversy is first submitted shall retain exclusive jurisdiction in regard to the matter.²⁰ Although a judgment of a court without jurisdiction is a nullity, yet after judgment has been rendered, its jurisdiction is always presumed. This presumption, however, is not conclusive and want of jurisdiction may always be shown.²¹

§ 4. Powers of Courts. Courts have certain inherent powers not granted in express terms by the Constitution or statute creating it, but necessary to the administration of justice. For example, all courts have the power to establish rules for the conduct of the business brought

¹⁸ *De La Montanya v. De La Montanya*, 112 Cal. 101.

¹⁹ *Lewis v. Darling*, 16 How. 1, 13.

²⁰ *Heidritter v. Elizabeth Oilcloth Co.*, 112 U. S. 274.

²¹ *Voorhees v. Bank of U. S.*, 10 Pet. 442.

before them, and they also have the power to enforce these rules. Courts uniformly have the power to appoint their officers, such as clerks and attorneys, and may remove these officers. Courts necessarily have the right to preserve order during the sessions. They also must have the authority to enforce their decrees, for otherwise a court's judgment would amount to nothing. Therefore, a court may punish a contempt of court and may fine or imprison the person guilty of such contempt. The judge does not constitute the court; where there are several judges their presence at the same time and place does not make a court. Judicial functions must be exercised by courts while they are in actual session as courts, at the times and places provided by law.

§ 5. Terms of Courts. For the sake of convenience, courts meet at set times and the period fixed for the session of the court is known as a term. The term begins on the first day of this period, at the hour named, and continues until the court is formally adjourned. Very often, especially in larger communities, one term is not adjourned until the other commences so that the court may be continually in session.

§ 6. Judgments of Courts. After a court has rendered judgment, the original demand concerning which the controversy arose is merged in the judgment and no suit can thereafter be maintained on this demand. The judgment, however, may be enforced by process issued out of the court where the judgment was obtained or it may even itself be the subject of a new suit. Frequently, judgments which would otherwise be outlawed by the Statute of Limitations are kept alive in this manner. A judgment cannot be collaterally attacked except for want of jurisdiction or in case of fraud. The remedy must always be by a direct proceeding, such as an appeal or, in certain cases, a direct action brought to set it aside for cause.

The final judgment of a court of competent jurisdiction over the parties and the subject is conclusive upon the parties and those claiming under them in reference to the

same subject-matter, in any action in which the same object is sought and the same questions are raised, unless the judgment is reversed or modified upon a writ of error or appeal; for since the existence of judicial tribunals is for the final determination of matters, and to that end the courts are open to all, parties are saved the annoyance of continued litigation by a maxim that "no one shall be twice vexed for the same cause."²² Where the causes of action are identical, or the subject of litigation the same, the effect of the judgment is to finally close the litigation of the matter even though new evidence is discovered or the clearest error appears; that is, the decision is a finality on everything which might have been urged.²³ Where the causes are not the same, the judgment is conclusive only upon the matters litigated and decided; and although no evidence can be heard to contradict what must necessarily have been decided, oral evidence is admissible to show what collateral matter was actually contested and passed upon.

§ 7. Summary of Court System in United States. The judicial system of the United States derived from England before the American Revolution, includes various species of courts, differing from one another not merely in jurisdiction but in their methods of procedure. Chief in importance are the courts of common law and the courts of equity, each of which has a separate origin as well as a distinct procedure of its own. In addition to law and equity courts, there are in America, courts of Probate, which have for their chief functions the administration of estates of deceased persons; courts of Admiralty, having a general admiralty jurisdiction, and certain special tribunals created for special purposes such as the court of Claims and the Commerce court of the United States. This article will be confined to the discussion of proceedings in courts of law and in equity courts or courts of chancery.

²² *Cromwell v. Co. of Sac.*, 94. U. S. 351.

²³ *Hart v. Moulton*, 104 Wis. 349; 76 Am. St. Rep. 881 and note.

CHAPTER II

HISTORY OF COURTS OF COMMON LAW

§ 8. Early English Common-Law Courts. During the Saxon period of English history, the kingdom became politically subdivided into counties, hundreds, and tithings. In each of these subdivisions courts were established having jurisdiction over local controversies, with a right of appeal from the lower tribunals to the higher, and from the highest to the Witenagemote or general assembly of the chief men of the kingdom, over which the sovereign, either personally or by a delegate, presided. Although the Hundred court never had great vitality in England, since a part of its powers seemed at an early date to have gone to a larger judicial body called the County or Shire court, yet this court was, as Sir Henry Maine points out,¹ the most ancient of the organized courts among the Germanic races. The judges of this court were all the freemen living within the limits of the hundred. In the earliest times, the king appears to have had nothing to do with the actual working of this court. He was merely represented in it by a class of officers who collected his share of the fines imposed, which constituted a very important part of the royal revenues. At that time the court, in most of the cases brought before it, was powerless to enforce its own decisions and seemed to exist merely as a sort of court of arbitration. A great function of this court was to give hot blood time to cool, and to prevent men from redressing their own wrongs. The earliest penalty for disobedience to the court was probably outlawry. "The man who did not abide by its sentence was out of the law. If he were killed, his kinsmen were forbidden, or were deterred by all the force of primitive opinion, from taking that vengeance

¹ Maine Early Law & Custom.

which otherwise would have been their duty and their right." ²

§ 9. **King's Bench and Its Branches.** Gradually the king began to exert an authority in enforcing the courts' judgments and a larger number of cases began to be appealed directly to the king and were finally decided by him. The attendance at these courts began also to be exceedingly burdensome to the people and the result was that finally the popular courts lost their power and the King's court became the court of importance in the kingdom. After the Conquest, the supreme judicial power came to reside in the king and in his assembly of counsellors, called the *Aula Regis* (the King's Bench). In this court the king was the legal fount of justice, though represented by a chief justicia.³ The court of *Aula Regis* followed the king's person and the administration of justice was, therefore, delayed and very uncertain. Accordingly, it was provided in Magna Charta that the court of Common Pleas (one branch of *Aula Regis*) should not follow the King's court, but should be held in some fixed place. This place was established by King John as at Westminster Hall, and there this court continued to sit from that time on to the present. Another branch of the *Aula Regis* soon after became separated and at first had to do with controversies concerning the royal revenue, while the original branch of the court of King's Bench retained its jurisdiction under that name over public wrongs or crimes. Gradually, however, through certain fictions of law it came about that all of these three great branches of the *Aula Regis* had to do with the administration of justice between citizens in private controversies. Thus, it began to be the practice in the court of Exchequer, which originally prosecuted those delinquent in payment of public dues, for the suitor who wished to sue in that court to allege that he was the king's debtor and was unable to pay the king because the person whom he was asking permission to sue would not pay him what was due, and that the king being

² *Idem*, ch. 6, p. 171.

³ BL Comm. 38.

thereby interested, the action was properly brought in that court. In addition to these three great courts there were in England many lesser courts of record. The people who lived at a distance from London were not able in the first instance to try their cases before the court of Exchequer or the court of Common Pleas, and hence courts of Assize and *Nisi Prius* were established. These courts were composed of two or more judges who, representing the king, were sent out all around the kingdom to hold court. The term *nisi prius*, meaning strictly "unless before", became applied to these traveling courts because the writ issued in each case directed the defendant to appear and answer at Westminster on a certain day *unless before* the traveling judges came into his county.

Thus, none of the ancient customs relating to the administration of justice in England seems to have entirely perished. The king who, before the time of King John, traveled about his kingdom and heard the petitions of his subjects is now represented by the judges of the Assize who hear cases throughout the circuit, and in America by our circuit judges who hold court in the various counties of one circuit; and the ancient popular court of the hundred, described by Sir Henry Maine, survives in the jury which decides questions of fact in courts of common law.

These three great courts of the English common law with their various subordinate branches constituted at the date of the American Revolution the system of courts called the "courts of the common law", to distinguish them particularly from "courts of equity", and these courts have continued under different names and powers to exercise judicial functions over criminal and civil cases, both in England and in this country, down to the present time.

CHAPTER III

JURISDICTION OF COURTS OF LAW AND THE ORIGINAL WRIT

According to the methods of procedure, early adopted in the courts of law, every action at law had to be instituted by a process known as the "original writ." It was originally in the form of a mandatory letter addressed to the sheriff under the great seal and in the king's name, containing a concise statement of the cause of action and requiring the sheriff to command the defendant to satisfy the complainant, or to appear before the proper court on a day named and account for his non-compliance.

§ 10. **Writ of Summons.** After retaining this form for many years, it finally lost the alternative feature, and ever since it has been known as the "writ of summons." In the so-called code States where the reform system of procedure has been adopted, it has undergone a still further change and is now only a summons or notice requiring the defendant to appear before a certain court at or within a certain time and answer the demand of the plaintiff's complaint.

In the English system, this writ was prepared in the office of the secretary or chancellor of the sovereign. Its statement of the claim of the plaintiff was intended not merely to give notice of its character to the defendant, but to show to the court that the controversy was within its jurisdiction, and for this purpose was made technically exact, for it was not every wrong that could be righted in courts of law. The private wrongs of which the law took cognizance, at this early period, were the exclusion from land of its direct owner, the failure to pay a definitely ascertainable debt, the breach of a contract under seal, and the forcible injury of persons or property. Writs to

meet these wrongs were gradually devised by the clerks in chancery as occasion for them arose, and were prepared with great care and skill and when perfected their form and contents were adhered to with the greatest exactitude. When an injured party applied for a writ, if the facts in his case corresponded with the statement of facts in any pre-existing writ, that writ was issued in his case; if not, no writ could issue and consequently redress was denied him. The effect of this practice was to deny a remedy to many persons, although they may have suffered great damage. Accordingly, in 1285, Parliament passed a statute which provided that when a case was presented to the clerks in chancery, for which no form or writ could be found, but which was an invasion of a right already recognized by the courts and required a remedy similar to those usually applied, the clerks should devise a new writ to meet this cause of action; and if they were unable to do this, the matter should be laid before the next Parliament by which a suitable writ should be prepared. This statute gave rise to what became known as actions on the case, that is, based upon the facts of each case. There were two general classes of these actions; the one covering implied contracts, the other indirect trespasses or negligence. After this statute, the following actions, together with some which in course of time became obsolete, came to be recognized as the common-law actions and are now in use in many of those American States which still adhere to the common-law procedure. These are as follows:

- (1) Actions *ex contractu* (arising out of contract): Debt, detinue, covenant, general assumpsit (or action on the case on promises), and special assumpsit.
- (2) Actions *ex delicto* (tort actions): Trespass, trespass on the case (or simply an action on the case), trover, replevin, and ejectment.

§ 11. **Actions Ex Contractu.** *Debt.* Debt is one of the earliest actions known to the English law. The theory is that the defendant has a sum of money which he is under obligation to deliver to the plaintiff, by reason of some

transaction between the parties out of which the obligation arose. The action is brought to recover a specific sum of money, liquidated or ascertained, and due from the defendant to the plaintiff. The action can be maintained when by contract, either under seal or not and either express or implied, a certain sum of money has become due and payable. It also lies to recover money due on a judgment.¹

Detinue. Formerly when a person wrongfully detained from another person chattels of which the latter was entitled to possession, the remedy was the action of detinue. This action was, however, subject to one disadvantage. According to ancient custom the defendant could have the action tried, not by a jury, but by a so-called wager of law. By this procedure if the defendant made oath in court that he did not detain the plaintiff's chattels, and then produced eleven witnesses, being his neighbors, who would swear that they believed him, he would prevail in the action, and the plaintiff would take nothing by his suit. It was, therefore, not a satisfactory remedy and fell into general disuse; hence the action of replevin, to be described later, became the general remedy for the recovery of personal property unlawfully detained.

Covenant. Covenant lies for the breach of a contract under seal. A promise under seal is by the common law of a higher nature than a mere verbal promise, or even one that is in writing but not sealed. The rule of the common law is that where a contract is sealed it is presumed to be made upon sufficient consideration; and in the action of covenant it is unnecessary to allege or prove any consideration. This action has in modern times been largely superseded by the action of assumpsit.

General Assumpsit. General assumpsit is based upon the theory that there has been a breach of promise, for which the plaintiff demands damages. The promise is, in fact, fictitious; that is, one implied by the law from facts sufficient to constitute an obligation. It was never made, although the law implies that it was. Liabilities arising

¹ 3 Bl. Comm. 154, 155; Chitty on Pleading 109, 115.

from implied promises as well as those arising from certain contracts or debts which may be sued for in the action of debt, can be sued upon in this form of action. The action of general assumpsit is one of the most comprehensive and convenient within the range of common-law actions.

Special Assumpsit. Special assumpsit is the action in which the plaintiff alleges a special promise actually made on some contract, the promise or engagement of which the defendant has broken; and the declaration states the contract and the breach.

§ 12. **Actions Ex Delictu.** *Trespass.* Trespass lies for redress in money damages for any injury done directly to the person, property, or rights of the plaintiff by immediate force or violence of the defendant.² The action takes its name from the wrong for which it furnishes a means of redress. Trespass means, in general, an injury to the person, property, or rights of another person done with force or violence. Trespass, accordingly, embraces such actions as assault and battery, false imprisonment, and actions brought for injury to personal property and to land.

Trespass on the Case. This action is sometimes called "case." It is so designated because formerly the plaintiff's case, or the state of facts on which he sought to recover, was set forth in the writ in the action. In other forms of action the cause of action was very concisely expressed in the writ, but here the whole facts, as alleged in the declaration, were also recited in the writ by which the suit was instituted. This action is of a later origin than the actions of debt, covenant, and trespass. It was devised to reach a class of cases which the ordinary writ of trespass did not touch and which none of the other writs could include. The action lies to recover damages for all wrongful acts causing injury to persons or property, which do not fall in any other class of actions. Trespass lies for direct violence causing injury; "case" for some wrongful act causing injury indirectly. Thus, if a man should throw a log of wood into the street, and should hit another person

² Chitty on Pleading 167.

who should happen to be passing, the person hit could bring action for trespass, for the force was immediate and direct. But if a man should throw a log into the street and negligently leave it there, and a person passing by in the dark should stumble over it, and fall and injure himself, he would have an action on the "case" against the man who threw and left the log there. This is the action made use of when injury to health has been done by nuisances; where injuries have resulted from careless driving of horses; and generally in the case of all acts of negligence causing injuries to others, not themselves in fault. It will be seen in the examples cited that there is no direct violence exercised against the plaintiff or his property, but that the defendant has failed to perform or has negligently performed some duty that he owed to the plaintiff. Some right of the plaintiff involving a corresponding duty on the part of the defendant has been violated either by wrongful act or by negligence.

Trover. Originally, this action applied to a case where the plaintiff had lost an article of personal property and the defendant had found it and converted it to his own use. In time, however, the action was brought in all cases where there had been a conversion of the plaintiff's personal property by the defendant. The declaration contains the allegation of a loss by the plaintiff and a finding by the defendant, but this is only fiction. The form of the action supposes that the defendant might have come lawfully by the chattels. If he did not, the plaintiff waives the trespass by bringing the action in this form, and the damages are recoverable not for the act of taking, but for the act of converting.

Replevin. This action was originally brought to recover possession of domestic animals which the landlord had unlawfully distrained from the tenant for rent. This remedy is now resorted to where it is sought to recover any kind of personal property wrongfully detained.

In American practice the action of replevin is regulated by statutes. These statutes usually not only provide for

the delivery of the property in question to the plaintiff, but also compensate him with damages for its detention.

Ejectionment. The action of ejectionment is interesting historically in that it illustrates the use of legal fictions in the development of the law. Originally, there was a common-law writ called *ejectione firmæ* (ejection from the farm), which the tenant for a term of years could bring when he had been wrongfully ejected from the land before the expiration of his term. The action originally was one for damages merely, and the tenant could not by this action recover possession of the land. In the reign of Edward IV., the court held that the tenant could also have judgment for possession as well as damages where his term had not expired. This decision was thereafter followed by the courts, and this rule of law suggested that the action of *ejectione firmæ* could be used to try titles to land; that it furnished a much simpler remedy than the ancient real actions such as formedon and dower, which were exceedingly technical and hence unsatisfactory. The way this writ came to be used was as follows: The claimant out of possession would enter upon the land and would execute a lease to some friend. This lessee would thereupon be put off the land by the actual occupant; the friend would then bring action against the person in possession, alleging title in his lessor, the fact of the lease to him, that he entered under the lease, and that he was ejected by the defendant. This action accordingly resulted in a trial of the title of the pretended lessor, and if his were the better title, the judgment was in favor of the plaintiff.

Then came another step in the development of the action in which the occupant in possession was left out in the first stages. After the entry and leasing, as above described, there would approach by pre-arrangement another friend of the claimant of title, and he would eject the lessee from the premises. He was called the casual ejector and action would then be commenced in the name of the lessee against this casual ejector; the latter would then notify the occupant of the action and advise him to defend it, as

he, the casual ejector, could make no defense. The real occupant would then come in, by substitution, as defendant; the real claimant would be substituted as plaintiff, and the question of title would be tried.

This action became simplified during the reign of Charles I., and was made to depend upon a series of legal fictions. All the formalities of the lease, entry, and ouster were dispensed with, in fact, but were alleged in the declaration. When the action was brought, the alleged casual ejector sent a written notice to the tenant in possession of the land with a copy of the declaration, informing him that an action had been brought, assuring the tenant that he, the casual ejector, named as defendant, had no title, and advising the tenant to appear in court and defend his own title, as otherwise he would suffer judgment by default. The defendant then coming in to defend, was allowed to do so on condition that he confess on the trial, the lease, entry, and ouster by himself. Thus, the only question left was that of title, which the trial proceeded to determine. Such was the condition of this action at the time of the American Revolution.

In modern American practice, ejectment is an action to try title to lands, and largely depends upon statutory provisions. Resort is no longer had to the old common-law fictions, but the action may be brought by one having such legal estate or interest in the land as entitles him to immediate possession. The actual occupant is made defendant, and with him, as a rule, is joined some person claiming title.

§ 13. **Extraordinary Legal Remedies.** In addition to the common-law actions mentioned, which are the ordinary actions in common-law procedure, there exist certain so-called extraordinary remedies. These are special proceedings rather than actions proper, and have a procedure and course of pleading different from that of ordinary actions. The most important of these are *mandamus*, *quo warranto*, *prohibition*, and *habeas corpus*, which are elsewhere treated in this work.

§ 14. Limitations on the Jurisdiction of Law Courts.

An examination of the actions enumerated above will show that although the jurisdiction of the courts of law were largely extended by the statute passed in the year 1285, which provided for the issue of new writs, nevertheless, many wrongs of a grievous nature to the sufferer are not redressible in the courts of common law. The ordinary jurisdiction of the courts of common law, it will be seen, is limited to cases which arise out of complete wrongs due to breach of contract, the dispossession of lands or goods, or the injury to persons or property, and which are remedied after the wrong has been done, by the restoration of the property, or by money damages.

By virtue of special statutes, courts of law sometimes exercise extraordinary jurisdiction, but instances of this kind are comparatively rare, and it may be said in general that the judicial authority of law courts remains substantially as it was established by Parliament in 1285, leaving to other courts the application of remedies for injuries which cannot be redressed in courts of law.

CHAPTER IV

COURTS OF LAW AND THE JURY

According to the English and American systems, the trial of cases in the courts of common law ordinarily takes place before a jury of the common people not versed in the law nor skilled in the investigation and interpretation of intricate questions of fact. To bring the case being tried within the comprehension of the jurors, the pleadings were so framed as to result in a single affirmation and denial, thus enabling the jury to decide the controversy by simply finding for one party or the other. Hence, courts of law are still further limited in their jurisdiction to controversies involving the two parties.

§ 15. Origin of the Jury System. Certain features of our modern jury system have existed from the earliest times. It is known that even in ancient Egypt, popular assemblies passed judgment upon matters of dispute; and popular assemblies of this kind existed in Greece and Rome. The modern jury, however, as we understand it, has been slowly developed on English soil, and its history may be divided into two parts. At first, the jurors were mere witnesses; whatever report or verdict they made or agreed upon was based, not upon the testimony of witnesses other than themselves, but upon what they derived from their own personal knowledge, or from reliable report. Not until the middle of the fifteenth century did they assume the character of judges, who were no longer required to furnish proof, but had simply to pronounce judgment upon proof brought before them. The history of the jury, in the first period of its development involves, therefore, an examination of the process by which definite issues of fact came to be submitted to bodies of witnesses, whose unanimous report was conclusive as to the question submitted.

§ 16. Anglo-Saxon Lawsuit. The ancient Anglo-Saxon lawsuit was a demand by one person of another for compensation. To this demand, made in solemn form, the defendant opposed an equally solemn contradiction. This made up the issue, and no allegations of fact were made by either party. By a peculiar inversion of ideas, judgment was rendered first, and proof required afterwards. The barbaric theory regarded proof not as a means of bringing conviction to the minds of the court, but as a satisfaction due to the adversary. How the proof should be given, and who should give it, were matters settled by this judgment. Three independent means of proof were known to the Anglo-Saxon law—oath, ordeal, and documents. To these forms was added, at about the time of the Conquest, proof by battle. Proof by oath of witnesses, however, in the form in which it appeared in the Anglo-Saxon procedure, does not meet the modern idea of legal testimony. The witnesses in Anglo-Saxon times could appear before the court only when produced by the parties required to make proof, and when thus produced they swore only to the assertions made by their chief.

§ 17. Norman Inquisition. The Normans introduced the judicial inquisition, which was an inquiry into the truth of a dispute. Allegations were authorized by the king's writ, commanding a judge, sheriff, or other royal officer to ascertain the right in question by the oaths of witnesses taken from the neighborhood. As we have seen, the customary witnesses of the Anglo-Saxon law were narrowed down by a rule which required that they should swear only to the assertions of their chief. The witnesses of the inquisition, after the Conquest, were emancipated from this old rigor of form and were sworn to answer all such questions as the judge should propound.

§ 18. "Recognition" Forerunner of Jury. During the reign of Henry II., he introduced another species of inquisition by proof, known as the "recognition". The distinction between a simple inquisition and a recognition was that the former consisted of an inquiry into a disputed alle-

gation conducted by a judge or other royal officer who propounded interrogatories to an indefinite number of witnesses taken from the locality; while the latter consisted of an inquiry made by a definite body of chosen witnesses who, after being duly chosen, were summoned by an officer of the law to make inquiry into the matter in dispute, and then to report the truth to the court itself. In each proceeding, inquiry was made by the oaths of witnesses whose answers were supposed to embody the knowledge of the community; but in a simple inquisition the witnesses were a part of the court and, as such, were interrogated by the judge. The recognitors sat apart from the court and conducted their own inquiry as a distinct body which stood between the parties and the judge. The recognitors, however, were regarded as mere witnesses; if any of the twelve did not possess the requisite knowledge, or if they disagreed, others were summoned until at least twelve agreed upon the facts. It required the concurrent testimony or verdict of twelve witnesses or recognitors to be conclusive of the right. Beyond this, in which the recognitors were mere witnesses, the Norman jury did not advance.

§ 19. The Modern Jury. Gradually the Norman system was improved. As we have seen, if any of the jurors chosen were uninformed as to the matters concerning which they were to swear, those who were informed were added to, until at last twelve were found who could unite in a definite conclusion in favor of one side or the other. Finally, however, the informed jurors came to be separated from the uninformed who, being thus relieved altogether of their character as witnesses, became judges of the evidence submitted by the others. This separation was probably brought about toward the end of the fifteenth century which probably saw the first modern jury.

It is easy to imagine how trial by jury superseded all other forms. The other more barbaric forms of proof naturally gave way to it. It superseded the other methods of trial because it was the most fit to survive.¹

¹ Taylor, *Origin and Growth of the English Constitution* 205, 321-333.

CHAPTER V

PROCEDURE IN ACTIONS AT LAW

§ 20. Commencement of an Action at Law. It has been pointed out that anciently each action at law was instituted by a process known as the original writ. In modern practice this original writ has given place to a summons which usually takes the form of a notice, requiring the defendant to appear before a certain court within a certain time.

§ 21. The Pleading. In an action at law, pleadings are so framed as to result in a single affirmation on one side and a denial on the other, so that the jury may decide the case by simply finding for one party or the other.

§ 22. The Declaration. The declaration is the first pleading according to common-law practice. In this declaration the plaintiff makes a statement of the facts which constitute his cause of action. First, facts showing that he had some primary right, and then the facts showing that this right has been invaded by the defendant so as to cause to exist a remedial right in favor of the plaintiff and against the defendant. To this declaration, the defendant must either plead or demur.

§ 23. The Demurrer. The demurrer is a formal mode of disputing the sufficiency in law of the plaintiff's cause of action. By this demurrer, the defendant, in fact, says to the plaintiff: "Granting that everything you say is true, what does it all amount to?" This demurrer raises a new question of law which is argued before and decided by the court. If the demurrer is overruled, the defendant must plead. If the demurrer is sustained, the plaintiff may ordinarily amend the declaration providing the facts, as they exist, permit it.

§ 24. The Plea. The plea is the answer of the defend-

ant. It may be a denial, which is called "traverse", or it may be a statement of some new matter by way of confession and avoidance. By this is meant other facts, not disclosed in the plaintiff's statement, which if true, would prevent the plaintiff from prevailing, even though the facts stated by him are true. This new matter may show that the plaintiff never, in fact, had a cause of action; that his primary rights never were in fact violated, though they may have been in appearance; or it may show that by reason of something happening since the plaintiff's cause of action accrued, his right of action has been extinguished—as, for example, by discharge, release, statute of limitations, or by other means.

§ 25. Classes of Pleas. Pleas may be either dilatory or peremptory. They are dilatory when they are founded on facts not connected with the merits of the case, such as pleas to the jurisdiction or pleas in abatement, showing some need of abatement of the suit.

Pleas are peremptory when they go to the merits of the case and impeach the right of the plaintiff to recover in any event on the cause of action alleged.

§ 26. The Replication. To the defendant's plea, the plaintiff must interpose another pleading and this pleading is called the "replication". If some new matter by way of confession and avoidance is stated in the plea, the plaintiff in his replication may traverse it or may meet it by other matter which avoids its effect as a defense.

§ 27. The Rejoinder. The defendant may desire to respond to the matter stated in the replication. If he desires to do this, he does so by a pleading called the "rejoinder". This goes on until some matter of fact is affirmed on one side and denied on the other, which brings the case to an issue of fact; and this issue of fact is ordinarily tried by a jury. Frequently, however, a jury is waived even in actions at law, and the whole matter is left with the court to decide.

§ 28. Pleadings Enumerated. The pleadings at common law are in the following order:

Plaintiff's Pleading	{ Declaration Replication Rebutter
Defendant's Pleading	{ Plea Rejoinder Surrebutter

Either party may demur to the pleading of the other when he deems it insufficient in law as a statement of a cause of action, or as an answer to a last preceding statement. This, of course, raises an issue of law to be tried by the court; the question being whether the pleading is sufficient for the purpose for which it is interposed.

§ 29. Pleadings in Code States. In many States the form of pleading as it existed at common law has been greatly modified, and, it is claimed, simplified. In these States, the action is not begun by a writ issuing from the court, but by a summons which is a simple notice to appear and defend the action. With the summons is served, ordinarily, a complaint in which in simple language the plaintiff states his cause of action, setting forth his primary rights and their invasion by the defendant. This creates the issue to be tried, and ordinarily all affirmative matters stated in the answer are deemed to be denied by the plaintiff without further plea. If, however, the defendant counterclaims, and sets up a cause of action against the plaintiff, this counter-claim must be answered in another pleading interposed by the plaintiff. Instead of answering, the defendant may demur to the complaint of the plaintiff as at common law, or the plaintiff may demur to the defendant's answer. This would raise a question of law to be determined by the court.

§ 30. Proceedings before Trial. As a rule, the case is not ready to be tried merely because issue has been joined. Various steps, some of them necessary, many of them usual, remain to be taken before the case actually gets before the court and jury.

§ 31. Bringing Case On for Trial. After issue has been joined in a case, it becomes ready for trial. The clerk of the court keeps a trial docket and the cases as they become ready for trial are entered and placed upon the calendar to be tried during the next succeeding term of court. Usually, court rules provide that before a case shall be placed upon the calendar it must be noticed for trial, and provision is usually made for a written notice to be served by one party upon the adverse party a certain number of days before court convenes. The cases are then tried in the order in which they stand on the calendar and the order depends upon the date of joining issue. Cases may be, and often are, tried out of their regular order, as the court has control over the calendar and exigencies frequently arise preventing the trial of the case at its regular time. As the cases are reached on the docket, they must be tried, continued, or dismissed.

§ 32. Continuance. To continue a case is to postpone the trial of it from one day to another, from the same term to the next term, or to a more remote term. Any case may be continued by consent of both parties, or on cause shown. Where a party desires a continuance for cause, the practice is to file a regular motion and an affidavit of the facts upon which it is asked. Such cause would be, for example, the inability of the party to obtain the presence of a material witness. Where a continuance is obtained without consent, the costs of the opposite party due to the continuance are required to be paid.

§ 33. Default. When a defendant has been served and fails to appear, the penalty is judgment by default. This is a judgment that the plaintiff have and recover; and under the regular practice, except in cases on promissory notes or debts where a complaint with a verification of the amount due has been filed, the amount of the damage is still open to inquiry, and upon that issue the defendant has a right to appear to cross-examine the plaintiff's witnesses and to offer any proof which is not intended to controvert the right of action. In some States, however, the practice is

to deny the defendant this right, unless for cause shown he is permitted by the court to appear and answer.

§ 34. Discovery and Examination of Adverse Party. Originally at common law, parties to actions were not competent witnesses, the theory being that their interest in the case disqualified them. Under the law as it then stood, recourse was had to equity and a bill of discovery filed against the adverse party praying for no relief except that the defendant make full and complete answers to the questions propounded in the bill. When the defendant had fully answered, the case was at an end, for there was no decree in such a case, the whole object of the proceedings being to obtain the information and then to use the answer in furtherance of other proceedings. Bills of discovery are rarely used nowadays for, not only may an adverse party be called and compelled to testify at the trial, but the practice is now almost universal in the United States to permit the adverse party to be examined as a witness before the trial. In this examination the examined party may be compelled to bring books and papers and any other documents which he may have in his possession, which are material and relevant to the cause.

§ 35. Depositions. It frequently happens that before a party is ready for trial, depositions of witnesses must be taken. The right to take deposition did not originally exist in common-law courts. It was the usual method of obtaining evidence in courts of equity and has come into general use in courts through statutory enactment. Witnesses cannot be compelled to appear personally before the court, if they reside without the State in which the action is pending, and hence if their deposition could not be taken and used at the trial, their evidence would have to be dispensed with. Frequently, witnesses live a very great distance from the place of trial and if their depositions could not be used at the trial, great hardship would result; hence, these statutes generally provide that the deposition of a witness may be taken in case he lives at more than a certain distance from the place of trial, or is about to leave the place where he is

residing, intending to go into another State, or where on account of physical inability the witness may not be able to appear personally. Certain grounds for taking depositions exist in various jurisdictions, these grounds being statutory. In general, the statutes provide where depositions are taken, that the witness appear before a court commissioner, notary public, or other officer and give his testimony either orally or by answering written interrogatories. A common practice is for the trial court to appoint a commissioner or commissioners to take the testimony. It is also universally provided by statute that notice of the taking of a deposition be given the adverse party, so that if he desires he may be present and cross-examine the witnesses produced.

§ 36. Compelling Attendance of Witnesses. Courts can not rightfully decide controversies unless they have the means to bring before them all persons acquainted with the facts, and hence each court having power to hear and determine any suit has, by the common law, inherent power to call for all proofs and, to that end, to summon and compel the attendance of witnesses before it.¹ The first process for bringing a witness into court is a subpoena. This is a judicial writ directed to the witness commanding him to appear at the court house on a day named and to give evidence and the truth to say in a cause there pending, wherein *A B* is plaintiff and *C D* is defendant (or otherwise describing the party) and not to depart thence without leave of court under a certain penalty therein named.² Where a witness has been duly subpoenaed and fails to attend, the usual course is for the court, upon the application of the party whose witness he is, to issue an attachment for him, under which he is arrested by the court's official and brought before the court and there compelled to give his evidence. In addition to this, he may be fined or imprisoned for contempt of court, unless he have sufficient excuse or his contempt be purged.

§ 37. Trial of Issues. It has been stated that, ordinarily,

¹ Greenleaf on Evidence, § 309.

² Thompson on Trials, § 157.

cases at law were submitted to a jury. It is, indeed, an ancient maxim of the law that issues of fact are to be tried by jury, and issues of law by the court. This, however, means no more than that the practice of trial by jury according to the constitutions of the various States, is a matter of right which may be demanded by the party if he so desires, but it is now very common to submit the issue of fact in actions of law to the court for trial, in which case the court makes findings of facts and conclusions of law as in an equity case.

§ 38. **Summoning the Jury.** The mode of selecting a jury from out the body of the county is regulated by statute, and it is the right of the parties to have a regularly-summoned panel of jurors from which to select the jury which is to try the issues in the case.

At common law no such thing was known as the preparation of a list of persons who were liable to be summoned as jurors at a succeeding term of court. But the uncontrolled discretion was vested in the sheriff or some other officer, of summoning such "good and lawful men" as they might choose. The practice, as might be supposed, led to many abuses, to remedy which American statutes generally provide for the preparation a given time before the commencement of any court term, or at other stated periods, of a list of persons within the county from whom jurors are to be summoned. The preparation of this list is generally confined either to special jury commissioners or to certain town officials. From the general list of persons eligible to serve as jurors a sub-list of names composing the panel is usually drawn by lot from a box or wheel. The array or panel of jurors thus drawn is then subject to public inspection, and is usually printed with the court calendar. The jurymen thus chosen are summoned under a writ directed to the sheriff of *venire facias* (that you cause to come). The number of jurymen on a panel is ordinarily determined by statute, but otherwise rests in the discretion of the court.³

³ U. S. v. *Insurgents*, 2 Dall. (U. S.) 335.

Parties cannot insist upon the attendance at one time of the full panel of jurymen, providing enough attend for the selection of a jury for the particular case.⁴ Where the requisite number of veniremen do not attend or the panel becomes reduced by claims of exemption or by challenges, talesmen or bystanders are summoned to serve on the jury.

§ 39. Challenging the Array. Each party, as before stated, has a right to have a regularly-summoned panel of jurors, and this right is protected by what is called a "challenge to the array." This challenges the competency of the jury as a whole, including the regularity of all the steps taken. Good grounds for challenging the array would be the interest of the summoning officer in the case, fraud in selecting the general list, or any irregularity operating to the prejudice of a party and preventing a fair trial.

§ 40. Selecting the Jury. The jury of twelve men are selected from the panel and are examined and chosen under the supervision of the court. The party maintaining the burden of proof in the case examines the jurors to test their competency or their desirability to him and for this purpose may ask such questions of the proposed jurymen as are material and relevant. Before answering, each proposed jurymen is sworn to tell the truth as to such questions as may be put to him concerning his competency as a jurymen. The proposed jurors are either called from the panel in their regular order, or are selected by lot.

§ 41. Challenges to the Polls. Challenges grounded on objections to particular jurors are called "challenges to the polls" to distinguish them from challenges made to the whole array. All such challenges fall into two classes: (1) peremptory challenges—that is, challenges for which no reason need be given; (2) challenges for disqualification—that is, challenges for which a legal reason must be given.

§ 42. Peremptory Challenges. Peremptory challenges were originally allowed only in capital felonies.⁵ Gradually, however, this right began to be applied in the case of misdemeanors and is given by statute very generally to

⁴ State v. Brown, 12 Minn. 538.

⁵ 4 Bl. Comm. 353.

parties in civil cases. This right is regulated by statute, and statutes increasing or diminishing the number of challenges allowed by the common law do not infringe the right of American constitutions, "that right of trial by jury shall remain inviolate."

§ 43. Challenges for Disqualification. In order to serve on the jury certain requirements must be satisfied. The juryman must be a freeholder where that is required by the statute, a resident of the district from which he is summoned and must not be an alien. The court would also have the power to disqualify the venireman who is ignorant of the English language. The juryman must be qualified to render a fair and impartial verdict in the particular case; hence, relationship with one of the parties to the suit would be proper grounds for disqualification. Interest in the suit would disqualify a man from being one of the jury. Strong bias or prejudice that would prevent his giving a fair verdict would be good ground for objection, as would be the fact that the juror already had an opinion in regard to the case, to remove which evidence would be required.

§ 44. Time and Order of Challenging. There can be no challenge to the array or to the polls unless a panel sufficient to furnish a jury is present. By the common law, all challenges must be made before the jury is sworn; but statutes exist in several American jurisdictions which authorize the court, for reason satisfactory to itself, to hear any objection to a juror, even if he is sworn, before the jury is complete. The challenge to the array and the challenge to the polls are demanded separately. The challenge to the array always precedes the challenge to the polls. If challenges to the polls are made without challenging the array, the right to challenge the array is waived.*

It has been held by some courts that the discovery that a disqualified person sat on the jury gives to the unsuccessful party the right to a new trial; this on the ground that such a person is no juror at all. Nevertheless, the general rule, grounded upon public policy and necessity, seems to be

* Thompson on Trials, § 91.

that a cause not discovered until a verdict is reached is not in itself sufficient ground for a new trial, although it may be such in the discretion of the court.⁷

§ 45. Swearing the Jury. After a jury of twelve has been selected, it is sworn. The common-law practice seems to have been to swear each juror as soon as accepted. By the American practice, however, the jurors are usually not sworn until a full jury is completed and then they are sworn in a body.⁸

§ 46. Voluntary Non-Suit. After the case is completed to final judgment, the plaintiff's rights are merged in that action and no further action may be brought. Voluntary non-suit is a privilege which the plaintiff has in order to avoid the taking of the judgment. In order to bar this right which exists at common law, the whole case must have gone to the jury. In trials by the court without a jury, non-suit may be taken even after the court has announced its opinion, but before judgment is entered. This will not be a bar to another action in behalf of the plaintiff.

§ 47. Plaintiff's Opening Statement. After the case has been called and the jury selected, the party upon whom, according to the issues joined, the burden of proof rests, begins the proceeding. This is done ordinarily by making an opening statement to the judge or jury, reciting in outline the important features which the party expects to offer and the points upon which he relies to make his case. After this statement the defendant may move for a dismissal of the case on the pleadings and opening statement of the case, and for the purposes of this hearing, both allegations of the complaint and the statement of counsel are construed most strongly in the plaintiff's favor; but if, after this liberal construction, the case presented is not sufficient to warrant a verdict, the court will dismiss the action unless the plaintiff obtains leave to amend.⁹

§ 48. The Evidence. The testimony introduced by the plaintiff in the first instance to prove his case, is called the

⁷ *Idem*, § 116.

⁹ *Kley v. Heeley*, 127 N. Y. 555.

⁸ *Idem*, § 104.

evidence in chief. The defending party then offers his evidence which is evidence for the defense, or evidence in reply; after which the plaintiff may offer evidence in rebuttal. The evidence produced and heard at the trial is governed by the laws relating to that subject and forms a separate branch of the law.

§ 49. The Non-Suit. Something has been said about voluntary non-suits. According to the common law, the court cannot compel the plaintiff to submit to a non-suit. It has been pointed out above that it is often in the interest of the plaintiff that a non-suit be taken, because by the finding of the jury the plaintiff is barred from commencing a new action for the same cause, while a non-suit would not prejudice the plaintiff in any subsequent action which he might choose to bring. In a large number of States, regardless of what the common law used to be, the power of the judge to order a non-suit without the permission of the plaintiff is conceded and seems to be common practice. In these States it is customary for the defendant at the close of the plaintiff's testimony to move for the non-suit, which is granted if no case has been made out.

§ 50. Demurrer to the Evidence and Motion to Exclude. In those States where non-suits are not granted except with the plaintiff's consent, it is the practice in jury trials after the evidence on the plaintiff's side has been heard and the defendant desires to take the case away from the jury, to move to strike out all the evidence or else to state to the court that the defendant demurs to the evidence, the effect being at that point to test the sufficiency of the evidence offered and to enable the court to determine the verdict, and in this manner terminate the trial.

Excluding the plaintiff's evidence is another method of defeating the cause at the close of the evidence and takes place on a motion to exclude and is equivalent to a demurrer to the evidence.¹⁰

§ 51. Directing a Verdict. Directing a verdict amounts practically to a demurrer to the evidence, or a motion to

¹⁰ Louisville Ry. Co. v. Woodson, 134 U. S. 614.

exclude. The effect in each case is to bar the plaintiff from commencing another action, unless he submits to a non-suit. Where a verdict is directed, it is followed by a judgment and this judgment is a bar to another action. Where there is some evidence tending to support each material allegation, the sufficiency of such evidence is for the jury and the court should submit the case, but where the evidence is so insufficient that the court would be compelled to set the verdict aside, he should direct a verdict for the defendant.¹¹

§ 52. The Argument to the Jury. After the testimony is all in on both sides, the case is argued to the jury by the counsel engaged in the case. It is a general practice which, however, is not entirely uniform, for the party upon which the burden of proof rests to open and close the case; that is, his counsel first is heard in his argument in chief, after which the defending party is given opportunity to be heard in reply and the plaintiff then closes the case.

§ 53. Charge to the Jury. In civil actions, the law governing the case is stated by the court to the jury, the sole province of the latter being to pass upon the questions of fact under the direction of the court. This charge to the jury is ordinarily given by the court after the argument of counsel, although in some jurisdictions the charge is given before the arguments are made. The charge may usually be given orally, although it is taken down by the shorthand reporter and may be made the basis of a motion for a new trial. In his charge, it is not in the province of the court to express any opinion as to the weight of the testimony. The court may, however, comment on the general tendency of evidence and may also state that there was no evidence upon some material fact in issue if such was the case. In some States the court has a right to comment on the evidence and to sum up evidence on either side that goes to prove or disprove the plaintiff's case. This is true in England, where much more latitude in this respect is given the courts than in the United States. In all jurisdictions the privilege is allowed of requesting the court to charge upon

¹¹ Pullman Pal. Car Co. v. Laack, 143 Ill. 242.

certain phases of the case as a party conceives them, and in many States counsel are required to prepare in writing and submit to the court such instructions as they deem right and necessary, and are not allowed to except to a proposition upon which they have asked no instructions.

§ 54. Deliberation of the Jury. After being instructed by the court, the jury is taken in charge by an officer of the court, usually a sheriff or bailiff, who conducts them to the jury room where they may deliberate until they have arrived at a unanimous agreement, or have reached a point where, according to the judgment of the court, they will not agree.

It is the usual practice for the jury in civil cases to separate during the trial. After the jurymen begin their deliberations, however, they are kept together until they have arrived at a verdict. The jury during their deliberations may ask further instructions from the court, and the court thereupon will re-instruct them upon the phase of the case concerning which such instructions are asked.

§ 55. The Verdict. When the jury has agreed, it is brought into the court room, and if court is in session, the judge or clerk of the court asks if they have agreed on a verdict, to which the foreman makes reply. The verdict is then handed in to the clerk, who reads it. The party which has lost the case may, if he desires, have the jury polled, which means that the party requests the court to ask each member of the jury whether the verdict was and now is his verdict. After this the verdict is recorded. The foregoing procedure is that followed in an ordinary, simple case at law; frequently several causes of action are united, and then it happens that there may be several verdicts, possibly finding the issues of fact for the plaintiff in one of his causes of action and for the defendant in another.

§ 56. Special Verdicts. A very common means of determining the effect of the evidence is to obtain from the jury a special verdict. This practice is regulated by the statutes of the different States. The practice is to submit to the jury a series of questions, which, together

with the law applicable, govern the case. The jury is not instructed as to what effect the answers to the various questions have regarding who is to prevail in the action. Upon their special verdict, judgment is rendered.

§ 57. Proceedings after Verdict. After the verdict is read and the jury discharged, the unsuccessful party has open to him as the last step a motion for a new trial, a motion in arrest of judgment (*non obstante veredicto*), or a motion for a repleader.

§ 58. Motion for New Trial. It may be that the unsuccessful party feels that the judge misconstrued the law applicable to the case in his charge, or that the evidence against him was insufficient in law. He, therefore, after the trial, may move the court to grant a new trial on the ground that the judge has misdirected the jury, or has admitted evidence contrary to law, or that the verdict of the jury is contrary to the evidence or to the law, or new and material facts may have come to light after the trial which the party did not know of before. In any of these cases he may make a motion before the court to be given a new trial and in case it should be granted, the case will be tried again from the beginning.

§ 59. Motion in Arrest of Judgment. If some error that might have been taken advantage of by demurrer appears, vitiating the proceedings, the unsuccessful party may move an arrest of judgment. This motion, however, can be made only with reference to objections apparent on the record.

§ 60. Judgment Non Obstante Veredicto. If the verdict be for the defendant, the plaintiff in some cases moves for judgment *non obstante veredicto*; that is, that judgment be given in his own favor without regard to the verdict obtained by the defendant. This motion is made in cases where there has been a plea by the defendant in confession and avoidance and issue joined thereon, and the plaintiff comes to the conclusion that such plea was not good in law and might have been made the subject of demurrer. If the plea itself was unavailing and insufficient as a matter of law, the verdict which merely shows it to be

true as a matter of fact, cannot avail to entitle the defendant to judgment; while, on the other hand, the plea being in confession and avoidance was, nevertheless, a confession of the plaintiff's declaration and also of the fact that the plaintiff was entitled to maintain his action. In such case, therefore, the court will give judgment for the plaintiff without regard to the verdict. This practice is not resorted to in code States, but is not uncommon in those States where the common-law pleadings are used.

§ 61. Motion for a Repleader. The motion for a repleader is made by the unsuccessful party after the verdict on the ground that the issue joined was inadequate and was not taken on a point proper to decide the action. In such cases where the issues submitted were immaterial, the court, not knowing for whom to give judgment, will award a repleader; that is, will order the pleas reformed for the purpose of obtaining the true issue.

§ 62. The Judgment. The verdict of the jury is followed by the judgment, which both as to form and substance depends upon who prevailed in the action. Costs are ordinarily awarded by the judgment to the prevailing party and these costs are ordinarily taxed by the clerk of the court. After the judgment has been signed, it is recorded and docketed. It is carried into effect by execution, and is also made a lien upon the real estate of the judgment debtor, although the lien feature of judgments as applying to real property did not prevail at common law. The subject is now universally regulated by statute.

§ 63. The Record and Bill of Exceptions. It was the old practice that proceedings of a court were shown by rolls made up by the attorneys engaged in the cases. The present practice is for the clerk of the court to keep a record of the trial. The summons, writs, pleadings, demurrers, verdicts, and judgment are all part of the record. Minor motions, orders, and rulings of the court are not matters of record. All of the rulings of the trial must be brought to the attention of the appellate court, however, and this is done by means of a bill of exceptions which presents to

the appellate court all the proceedings in addition to the record proper which are material to the hearing of the appeal.

When any ruling is made by the court, either on a motion or in regard to the admission of evidence, the party against whom the ruling is made, if he desires to have the ruling of the court passed upon by the appellate court, must take an exception to it. This is ordinarily done orally and the exception noted by the reporter. Exceptions as to more formal orders are generally required to be written out and filed. A ruling of the court will not be noticed by the appellate court unless exception has been taken to it.

The bill of exceptions is a certificate of the judge of the court in which the judgment is rendered, stating that the facts as therein set forth took place. In theory, the actual memorandum of exceptions is prepared during the progress of the trial and is contemporaneous with the rulings of the court. This was the early practice, but at the present time the bill of exceptions is made up after the trial. The contents of the bill of exceptions are all motions, all rulings of the court, and objections as to any impropriety on the part of opposing counsel or of the jurors. In all cases the bill of exceptions must show precisely what took place. The instructions of the court to the jury are not a part of the record proper, but must be incorporated in the bill of exceptions. This bill of exceptions is signed by the judge who presided at the trial and goes up to the appellate court with the record.

§ 64. Writs of Error and Appeals. The proceedings of lower courts can be reviewed in a court of appellate jurisdiction. The case can be taken from the lower to the higher court in one of two ways: either on writ of error or by appeal. A writ of error issues out of the appellate court and is directed to the lower court. It commands that the record be sent up, so that any errors of law appearing in the record may be corrected by reversing the judgment. The writ of error is the common-law method of bringing a case to the higher court for review.

The appeal is of civil-law origin. It removes a cause entirely to the appellate court, subjecting the facts as well as the law to review. The appeal provided by statute may serve as a writ of error or civil-law appeal according to the nature of the case and the provisions of the statutes which authorize it. Very generally, however, in code States the appeal takes the place of the common-law writ of error.

CHAPTER VI

SUITS IN EQUITY

§ 65. Origin of Equity Jurisprudence. We have seen that no redress could be granted by the courts of common law until there had been a completed wrong. No suits could be brought until an injury had been committed and the court by its judgment either awarded money damages or provided for the restoration of the plaintiff's property. Many injuries demanded redress which the law courts were powerless to furnish. It therefore came to be the custom in England at an early day, in such cases to directly petition the king as the supreme authority for redress. Whereupon he or his representative applied such remedy as his sense of justice prescribed. It gradually became the custom of the king to refer all of these petitions to one official, the king's chancellor, who was his secretary and whose duty it was to issue writs to the courts of common law. The chancellor was also the king's chaplain; hence, it was fitting that he should come to be the administrator of justice in the king's name. Accordingly, where no redress could be afforded by the common law on the ground that no precedent existed for it, or the remedy afforded by the common law was incomplete, a resort to the chancellor became available.¹

§ 66. Development of Equity Courts. For a long period, the chancellor's power was simply advisory. He was the king's chaplain, hence might inflict ecclesiastical censures on the people, but could do no more. A means was later on devised for the more efficient carrying out of the chancellors' orders. In the reign of Richard II., Chancellor Waltham invented a writ of subpœna by which the parties to a controversy could be brought before his tribunal and

¹ Bl. Comm. 46-55, 429-443.

compelled to remain there until his orders were obeyed, under penalty (*subpœna*) if they refused. This authority became recognized by the king and the people, and the result was to give to the chancellor direct jurisdiction over the persons of all the parties to the controversy. Thus, relief of a new kind and unknown to the courts of law, became possible. Threatened injuries could be prevented, and it was not necessary to wait until injury had actually been done. So, also, controversies in which the parties were numerous could be adjusted in the same way as could suits between two parties. The chancellor finally began to grant relief even against judgments of the common law; and this exercise of power brought his jurisdiction into conflict with the courts of law. The right of the chancellor to grant this relief was finally recognized. The powers exercised by the chancellor became vested in courts of equity and there grew up certain fundamental equitable maxims which were applied by these courts. There also was evolved a hard and fast method of procedure.²

§ 67. The Jurisdiction of Equity Courts. The principal test of equity jurisdiction is the existence of an adequate remedy at law. If the law courts can take as complete a cognizance of the controversy and of the parties to it as a court of equity could do and can effect a remedy as sufficient and as practically adapted to the ends of justice as a court of equity could give, the case is one at law, and equity cannot interfere.³ Applying this test, it will be seen that there are many cases where equity affords the only complete remedy. There are many cases requiring a preventive remedy on account of the irreparable nature of the threatened injury, or the large number of suits that would result in case the action were brought at law; hence, equity frequently prevents by an injunction actions which would likely result in injury for which no money damages would compensate.

Frequently in the absence of statutes allowing parties to be witnesses, it was necessary that there should be a dis-

² Walker, *American Law*, 55-57.

³ *Buzzard v. Huston*, 119 U. S. 347.

closure between the existing parties of matters known only by one of them, and without the knowledge of which there could not be a correct decision of the controversy; hence, equity granted a discovery by a bill brought for that purpose.

There are many cases where the interests of more than two parties are involved to such an extent that the controversy cannot be finally adjusted as to any of them without bringing before the court the other interested parties. Such cases are those brought for the foreclosure of mortgages and the partition of property between co-tenants, both of these actions being equitable. Frequently, the mere payment of money damages will not afford complete relief. This may be obtained only by the actual carrying out of some agreement by one or more of the parties to the action. Such a case would be one for equity which would require the specific performance of the contract.

There are many cases involving rights of property which were unknown to the law when the remedies provided by the common-law courts were devised. Equity in these cases affords the only proper remedy. An example of the last class would be the protection of the separate property of married women.

There is still another class of cases where persons are absolved from duties recognized by law, by the conduct of other persons, and although this conduct may not be available as a defense at law, it renders the performance of the duty inequitable. Equity will therefore relieve against inequitable forfeitures, or will prevent the enforcing of an inequitable judgment.

No attempt has been made to mention all of the cases cognizable by a court of equity, but enough has been said to point out in a general way the jurisdiction of equity courts.

§ 68. Limitations of Equity Jurisdiction. Mention has been made of the fact that gradually the rules of procedure in equity courts became hard and fast. Not only is equity limited as to its procedure, but as a system of substantive

law it has also become hard and fast. It accepts the same classifications and distinctions of persons and property rights and duties which are recognized by courts of law. It cannot create any new rights nor can it introduce new remedies in violation of law.

§ 69. **Equity Pleading.** Equity pleading differs materially from pleading at common law. The first pleading of the plaintiff is called a bill of complaint. In it, he sets forth his cause for action and any pretended defenses which he anticipates that the defendant will set up, and also the fact that such pretended defenses are groundless. According to the old practice there are also incorporated in the bill certain clauses called the jurisdictional clauses and the confederacy clause, although these are now dispensed with in equity practice in United States courts. The bill prays for process and for injunction, if temporary injunction be sought, and for relief, especially that which the plaintiff desires, and also for general relief, that is, such as the court may grant upon the case as made out. The filing of the bill gives the court jurisdiction of the subject-matter.

The clerk of the court then issues a writ of *subpœna*, commanding the defendant to appear on a certain day and under a certain penalty to answer the bill. The *subpœna* is served on the defendant either personally or by substituted service, as publication. The next step is for the defendant to enter his appearance which in Federal courts he does on the next rule day, usually the first Monday of the succeeding month. On the next succeeding rule day, the defendant must *demur*, *plead*, or *answer*. If the bill fails to state a cause of suit he may demur, thus raising an issue of law. If the defendant have some definite defense to the action, such as infancy or bankruptcy, or some plea to the jurisdiction, he meets the bill by plea. If he cannot interpose such plea the defendant must meet the case by denial, explanation, or confession and avoidance. If the bill contain a list of interrogatories the defendant must specifically answer them on oath, unless the oath be waived. If the plaintiff deems the answer filed by the

defendant insufficient, he files exceptions to such parts of it as are not sufficient as a defense or as a disclosure. The exceptions point out the insufficiencies and are somewhat in the nature of a demurrer. They are heard by the court or a master and if found well taken the defendant must again answer more fully. If the answer is not accepted, then the plaintiff must file a *general replication* which is merely a formal joinder of issue.

§ 70. **Dismissing the Bill.** After an equity case is begun, it was frequently the practice for the defendant to move to have the bill dismissed for want of prosecution. This was the old method of expediting the proceedings of the complainant or plaintiff. In modern practice, however, the defendant is no longer obliged to wait the plaintiff's motion but may either take or require the plaintiff to take any steps necessary to expedite the cause.

§ 71. **Motions, Rules, Orders.** A chancery or equity case is speeded on its course by means of motions, rules, and orders.

A motion in chancery is a written request in the form of a motion to the court that the opposite party be required to do certain things or that something be done in the case. A motion amounts to nothing unless called up and presented in open court; the mere filing of the document avails nothing.⁴ Rules *nisi* are frequently granted during the pendency of a case, that a party do certain things or that he show cause why they should not be done. Everything done in a case is done under an order of the court upon rules entered.

§ 72. **Defaults.** Default decrees without appearance and answer were originally unknown in chancery, it being the theory to compel appearance and answer by contempt proceedings. Defaults were finally introduced into chancery courts, and decrees *pro confesso* are now entered where a defendant fails to appear and answer; his entire failure to answer being treated as a confession of the bill.

§ 73. **Preliminary Hearing of Case.** After settling the

⁴ Thompson v. Woster, 114 U. S. 104, 111.

issues the case stands for hearing. It is not usual to have a jury in equity cases. Nevertheless, an issue may be framed and submitted by the court to a jury. These are called feigned issues, because this is not the real and binding mode of trial. The verdict in a chancery case is merely advisory. The practice of calling upon a jury to decide a case in equity is little used.

Hearing by Master. In some cases where there is evidence to be taken, the action is referred to a master in chancery or referee to take and report the proofs. He may be required to report with his findings of facts his conclusions of law as well, or he may simply report the evidence. If the master hears the evidence the parties are given an opportunity by their solicitors to argue upon the questions involved and after argument the master reports.

Objections to the report questioning the correctness of it may be allowed and these may possibly be re-argued. After the re-argument of the objections and the master's findings, either party may except to the master's report and rulings and then these are ready for hearing before the court.

§ 74. Hearing before the Court. The final hearing is before the judge sitting as a chancellor. After the evidence has been taken by the master, the case is heard on the exceptions to the master's report and the argument is confined to the points to which exceptions have been taken.

Where the evidence has been taken in open court, as is often the case, the whole case is heard, argued, and decided by the court.

§ 75. Decrees. After the case has been decided, a final decree is filed which is made by the court. The final decree entered in a case adjusts the equities of all the parties and orders what each is to do and what each is to receive. All of the orders made by the court in an equity suit are in the nature of decrees, but the term decree is usually applied to that order which adjudicates the rights of the parties in regard to the merits of the cause.

§ 76. Review and Appeal. After the decision has been

entered, the party desiring a review may proceed in one of four ways:

- (1) File a demurrer for correction when the decree contains some error.
- (2) Petition for new hearing for errors in the record, when there is some supposed error in the decision.
- (3) File a bill of review for newly-discovered evidence, when such has come to light since the hearing and could not with reasonable diligence have been found before.
- (4) Appeal to a court having appellate jurisdiction on giving security for costs and the carrying out of the decree as ordered.

COMMERCIAL ACCOUNTS AS EVIDENCE

CHAPTER I

ACCOUNT BOOKS

The importance of this subject to the student preparing for practice of the law cannot be exaggerated. The late Judge Townsend, of the United States Circuit Court, once related to the author his experience in preparing himself for the trial of a case wherein a book account of some considerable length was involved. The experience of this bright young lawyer who worked two days and nights consecutively, with the tutoring of an experienced bookkeeper, to master the subject of the method of keeping commercial accounts, has doubtless been duplicated in numberless instances by lawyers whose preliminary education had not included this practical subject.

One of the most important branches of the practice of the law today is that concerned with business enterprises, one branch of which is the conduct of litigation involving commercial matters. In treating this subject the point of view will be from the standpoint of the practicing lawyer.

§ 1. Accounting, Definition Of. The term "accounting," as ordinarily used, refers to records of the debits and credits in business transactions. The term "bookkeeping" has a broader meaning and includes the recording of documents, the recording required in the offices of clerks of courts where judgments are recorded and the records required in the offices of municipal corporations generally. For the purpose of this study, we may define accounting as the "method of recording business transactions in a systematic manner."

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§ 2. Systems of Accounting. There are two systems of accounting in common use. They are called single entry and double entry. Single entry is so called because the record of a transaction may be entered on but one side of the set of accounts. Double entry is so called because each transaction requires an entry, or the equivalent of an entry, to opposite sides of one or more accounts. It is a system of making two entries of every transaction, and has generally supplanted single entry as the latter fails to exhibit at any one time the true financial condition of the business, and is incapable of proof of accuracy.

§ 3. Debits and Credits. The entries made upon the respective sides of the accounts are called debits and credits. A debit is value delivered or rendered by the person or company for whom the set of accounts is kept. Debits are always entered on the left-hand side of the account. A credit is value received by the person or company for whom the set of accounts is kept. Credits are always entered on the right-hand side of the account. Derivations from these words indicate the other party in any transaction in which a debit or credit is concerned, namely, debtor and creditor.

§ 4. A Set of Account Books. In the evolution of business enterprises the necessity of preserving accurate records of business transactions in the most convenient manner, has resulted in the general adoption of certain methods of procedure in the use of the books rendered necessary so that there has been a practical uniformity of practice in this matter in nearly all parts of the civilized world. The account books comprising a set in its first appearance as a set, so called, are a daybook, a ledger, and a cashbook.

Daybook. Originally, it may be presumed, in bookkeeping, accounts were kept in one book, which contained simply a chronological record of such business transactions as it was desired to preserve a record of in permanent form. For the purpose of our study, we shall not concern ourselves with the period antedating the use of paper or

parchment in accounting. With the methods pursued in the days when accounts were kept upon notched sticks or upon bricks we have not for the purpose of our study any concern. The record book described is called a daybook.

Ledger. From the stage of accounting represented by the one book, it is not a long step to the next stage in which the merchant or trader adds another book in which he copies upon certain pages memoranda of the business transactions with specified individuals. For instance, in his original book he will have, scattered through the course of some period of time a number of charges against John Smith, and perhaps some credits in his favor. It will be very convenient to gather these items upon one page under the name of John Smith, placing charges against him upon one side of the page and credits in his favor upon the other side. When John Smith is ready to compare accounts and make a settlement, the items can thus be readily referred to and checked, and the balance due from John Smith, or in his favor, may be readily ascertained by subtracting the total of the smaller side of the account from the total of the larger side. If the left-hand side is the larger, the balance will be due from John Smith. If the right-hand side is the larger, the balance is in his favor. This page is called a ledger page, and the book in which such a summary of each account is collated is called a ledger. The record upon such a page is called a ledger account.

Cashbook. The next step in the evolution of the set of books takes place when the business man finds that it will be convenient to have two books of original entry instead of one. Heretofore, he has been making all original entries in one book, the daybook. All business transactions may be divided into two classes: *First*, those involving a transfer of cash at the time of the transaction; and, *second*, those not involving a transfer of cash at the time of the transaction. The step now about to be taken in the evolution of the system of accounting is the division of the original entries of the transactions into these two classes. Conse-

quently, another book is added to the set of two, and this third book is called the cashbook. After the addition of this book, all transactions not involving a transfer of cash at the time of the transaction are entered in the daybook. And all transactions involving a transfer of cash at the time of the transaction (that is, all of which it is desired to keep a record), are entered in the cashbook.

The set of books which we have now described, namely, daybook, ledger, and cashbook, compose a complete set of accounting record books, and the set contains all the elements found in the most extensive and complicated set of accounts in use in any business.

§ 5. Purchase Book. In the course of time it becomes desirable to further divide the transactions which are entered in the daybook. Another book is added and the items formerly entered in the daybook are now classified into sales and purchases. The daybook now becomes the sales book, and the book just added becomes the purchase book. All sales wherein the price of the goods is not paid at the time of the sale are entered in the sales book, that is, all sales not involving a transfer of cash at the time of the transaction. All purchases wherein the purchase price of the goods is not paid at the time of the purchase are entered in the purchase book.

§ 6. Daybook, Sales Book, Purchase Book, Cashbook, and Ledger in Practice. The lawyer finds that in actual practice, in the greater part of all litigation in which business accounts are involved, the sets of accounts which he is called upon to use as evidence, or to cross-examine upon when presented by opponents in court, consist of the books described, namely, the daybook, sales book, purchase book, cashbook, and ledger.

§ 7. Bills Receivable and Bills Payable Book. As a business enterprise grows, it is found convenient to add other books. Since promissory notes are used to so large an extent in the carrying on of all business, it has been found convenient to adopt a book specially devised for keeping a record of notes issued by the proprietor of the

business or the company, and of notes drawn by other persons in his or its favor. Notes issued by the proprietor or company are called bills payable, and notes drawn by other persons which are payable to the proprietor or company are called bills receivable. The book in which a record of such notes is kept is called the bills receivable and bills payable book.

§ 8. Invoice Book. Another book which it has been found convenient to add is called the invoice book. This usually takes the form of a large scrapbook. In this book are pasted the bills received from the firms of whom goods are purchased, after the goods have arrived and have been examined, the prices found correct, and the extensions proved. There are two methods of keeping this book. The bills may be pasted in chronological order, in which case an index gives ready reference to any particular bill desired, or they may be pasted in so that all the bills from any one firm will be found grouped together. Sometimes it will be found that the purchase book described in a previous paragraph is, in form, this invoice book.

§ 9. Trial Balance Book. Another subsidiary book almost invariably found in double entry accounting systems is a trial balance book. In this book are entered the items making up the successive trial balances taken off the books for a given period. The books are so devised that by writing the names of the accounts once, this suffices for a year. The nature of the entries in this book will be explained under the head of the trial balance.

§ 10. Other Subsidiary Books. Other subsidiary books have been devised and added to systems in use in various kinds of business establishments, as the need for such books has arisen in the particular business concerned. A lawyer who understands accounting methods need not hesitate to examine upon any such subsidiary books, for a few minutes' inspection will show that they are mere adjuncts to the main books of the system, and a few questions as to the purpose of, and method in which such books are used, will give him all the information required.

CHAPTER II

THE FUNDAMENTAL PRINCIPLES OF ACCOUNTING

§ 11. Original Entries. Every business transaction, simple or complicated, may be resolved into one of two classes, namely, value delivered or rendered, or value received. For every such transaction there is an appropriate entry upon the set of accounts. The lawyer will note that under one of the principles of the law of evidence, only original entries are admissible as evidence. Consequently, as will be explained later, it is always necessary, whenever accounts are to be used in courts, to ascertain definitely, in advance, the books required. It is always necessary that the lawyer look after this matter, as clients do not appreciate the rule involved. They generally prefer to bring in only their ledgers containing the full account, almost invariably objecting to bringing in the books containing the original entries, on account of the trouble involved in going through stores of old and discarded books to find the books required, and carting them to court. Nevertheless, despite objection and trouble, the books containing the only evidence which is admissible must be produced.

There is always some book in which, in accordance with the system in use, the original entry of the transaction is made. This book may be a daybook, a sales book, a purchase book, or a cashbook. In the case of records of promissory notes, inquiry is always necessary as to the method adopted, which may be a so-called journal entry upon some book, or an entry in a bills receivable and bills payable book. The author encountered a case recently in which the plaintiff had been in the habit of entering all promissory notes directly upon a bills receivable or bills payable account in a ledger. It is possible that such a bills payable or bills receivable ledger account would be admitted

as lawful evidence, but such a method is not a proper one and the account would always be subjected to a strict scrutiny before being admitted as evidence.

§ 12. Form of Account Books. The daybook, sales book, purchase book, and cashbook mentioned above, may be in the form of bound books, or loose sheets held together in a binder, called a loose-leaf system, or may be on cards and handled in trays or drawers in cabinets similar to card index systems. Whatever the form of the book, the principles governing the method of making entries are the same.

§ 13. Entries in Sales Book. The sales book is readily understood. The entry states the name and address of the person or company to whom the merchandise is sold, the number of each class of articles, price per article, and total price amount of each class of articles and the total amount of the sale.

§ 14. Entries in Purchase Book. The purchase book entry states the name of the person or firm from whom the merchandise is purchased, with an itemized statement of the purchase and price of same, and the total amount of the purchase. Usually the entry in the purchase book is simply a copy of the bill rendered by the firm of whom the merchandise was bought. Or, as stated before, the purchase book may be in form a big scrapbook in which the bills received from the firms supplying the merchandise are pasted.

§ 15. Entries in Daybook. Where a daybook is used in place of sales book and purchase book, it is simply a combination of the two and contains entries of both kinds.

§ 16. Entries in Cashbook. The cashbook entries are a little more complicated. Cash, in respect to accounting, includes money, money orders, checks, and drafts which are payable on demand. All cash received is entered on the debit side of the cashbook, and all cash paid out is entered on the credit side of the cashbook. The cashbook will usually be found to be in one of four forms in common use. One form is the ordinary journal-ruled book in which

the left-hand dollars and cents column on each page is the debit column, and the right-hand column on each page is the credit column. The second form is also the ordinary journal-ruled book, but the whole left-hand page is taken for the debit side of the account and the right-hand page for the credit side. The third form is that of a ledger-ruled book in which the left-hand side of the page is taken for the debit side of the cash account and the right-hand side for the credit side. The fourth form is that of a book ruled with a date column at the left edge of the left-hand page, a wide space for the entry of the description of the transaction, and the rest of the left-hand page and all the right-hand page are taken up with columns ruled for dollars and cents, arranged for various kinds of entries in order to accommodate requirements of the individual business. The purpose of such a cashbook is to divide and classify the cash receipts and cash disbursements. The cash receipts may be divided into classes or all the cash receipts may be entered in one column, the method adopted in this respect depending upon the requirements of the particular accounting system. Likewise the cash disbursements may be divided and classified or may be entered in one column, in accordance with the requirements of the particular accounting system. The lawyer need feel no hesitation in examining upon a columnar cashbook as the character of the entries in each column will always be indicated by written or printed headings at the top of each column.

§ 17. Posting. The process of carrying the items from the original books of entry into the ledger is called posting. Since the entries in the sales book represent value delivered to the persons or firms charged with the merchandise, such entries are called debits and are posted to the left-hand side of the ledger account of such firms. The entries in the purchase book represent value received from the firms therein named, and as such the entries are posted to the right-hand side of the ledger accounts of such firms. Regarding the cashbook entries, it may be taken as a sim-

ple rule that all debits in the cashbook are posted to the credit side of the ledger accounts of the firms or persons who paid cash. And *vice versa*, the credit items in the cashbook are posted to the debit side of the ledger accounts of the firms or persons to whom the cash was paid or the ledger accounts representing the purpose for which the cash was expended, such as furniture and fixtures account, machinery account, real-estate account, stable account, etc.

§ 18. Double-Entry System. The foregoing entries comprise the fundamental principles of accounting as employed in single-entry systems. In double-entry systems there is a corresponding entry or its equivalent upon the opposite side of the same or some other account, to balance the entry which has been made upon the debit or credit side of an account in accordance with the foregoing rules. We have seen that in cashbook entries where there is a debit entry on the cashbook, there must be a corresponding credit entry on some ledger account. In double entry this principle is applied to all entries, those in the sales book and purchase book as well as to those in the cashbook. For instance, in double entry there is carried in the ledger an account called merchandise account. At the end of each month, or any adopted period, the total amount of the purchases during such period, as recorded in the purchase book, is posted to the debit side of this merchandise account. It is seen that this debit entry upon merchandise account balances in amount all the entries upon the credit side of the various ledger accounts posted from the purchase book during such period. The total amount of the sales for such period is posted from the footing of the sales book to the credit side of the merchandise account in the ledger. This item upon the credit side of merchandise account thus balances all the entries made upon the debit side of the various ledger accounts in posting the sales during such period. The total amount of the cash sales during the period is ascertained from the cashbook where it appears as a debit, and is posted to the credit side of merchandise account in the ledger, which item thus

balances the same aggregate amount upon the debit side of the cashbook. The total amount of the cash expenses during the period is ascertained from the credit side of the cashbook and is posted to the debit side of expense account in the ledger, thus balancing the aggregate amount of the individual items in that account upon the credit side of the cashbook. All the other items in the cashbook have already been posted to the opposite side of ledger accounts.

For every entry on one side of the set of accounts, there has now been a corresponding entry upon the opposite side. This is double entry bookkeeping. The foregoing comprise all the fundamental principles of accounting. These principles will be found to underlie and govern the conduct of every properly-kept set of accounts.

§ 19. Trial Balance. In accounting systems kept by double entry it is customary to draw off at stated periods, usually monthly, a statement of the balances standing upon the open accounts. This statement is called a trial balance. It has been implied in what has already been said, that the cash account is kept in the cashbook and not in the ledger. In some business establishments, a so-called cash account is kept in the ledger, containing only the monthly balances of cash. In taking off the balances of the account, the balance of the cash account is taken from the cashbook, and the other balances from the accounts in the ledger. The statement is headed "Trial Balance" and dated. The balance of the cash account is the balance of cash on hand. In balancing the cashbook it is customary, after finding the difference between the credit and the debit side, to enter upon the credit side in red ink just below the last entry upon that page, the words "Balance Cash on Hand" and in the credit column the amount of such balance. This balance is the first item to go upon the trial balance.

The rule in making the trial balance is that when the balance upon the books is upon the debit side of the account, that is, when the debit side is larger than the credit side,

the balance is entered in the debit column on the trial balance. This is the case where there is a balance of cash on hand, as the debit side of the cash account will be larger than the credit side. Where the credit side of any account is larger than the debit side, the balance is entered in the credit column of the trial balance. Thus, when the trial balance is completed, it will contain a statement of the amount of cash on hand, and the name and balance of every open account in the ledger. Inasmuch as for every entry on one side there has been a corresponding entry on the other side of the set of accounts, it follows that the debit and credit sides of the trial balance should be equal.

The trial balance serves two purposes: It gives to the credit man of the company a monthly statement of open accounts for review and action as needed, and it is assumed by the bookkeeper that if his balance is perfect his postings have been correct. The lawyer will note that when in actual practice he is confronted with a trial balance which apparently shows that the postings have been correctly performed, that the trial balance does not, by any means, prove that such is the fact, even though the trial balance is correct and shows the actual condition of the accounts. This is so for the reason that the trial balance detects only errors in posting to one or the other side, that is, an error in posting an amount wrongly, or in posting an amount to one side when it should be on the other side, or an error in carrying footings from one page to another. If the item of sale for \$2,500 to John Smith, was by mistake posted to the debit side of Charles Smith's ledger account, instead of to John Smith's account, the trial balance would not detect such error. It is customary, as has already been stated, to keep the records of the trial balances in books specially devised for this purpose, called trial balance books.

§ 20. Statement of Condition of Business or Balance Sheet. The trial balance above described does not purport to show the condition of the business, for the reason that

there are in the ledger certain accounts called fictitious accounts, and furthermore, it is not customary to take inventory every time a trial balance is made. In preparing for a statement of condition of business or a balance sheet as it is also called, a trial balance is made in order to prove the balance of the books. Then it is necessary to close expense account and any other fictitious accounts in the ledger. There is opened in the ledger a profit and loss account. Expense account is closed into profit and loss account. Other fictitious accounts are closed into appropriate accounts. An inventory of merchandise on hand is prepared and the amount credited to merchandise account in the ledger. Merchandise account is now closed into profit and loss account. The amount which is carried from merchandise account to profit and loss account represents the gross profit or loss during the period. All worthless accounts of customers and all other losses, and depreciations on furniture and fixtures, machinery, and any other like items, are charged off and debited to profit and loss account. The difference between the two sides of profit and loss account now shows the net profit or loss during the period. A statement of condition of business may now be made if it is desired to show the profit and loss account as an asset or liability. If it is desired to dispose of profit and loss account before making the statement of condition of business, profit and loss account will be closed in accordance with one of the following rules: (1) If the business is owned by a single proprietor, profit and loss account is closed into his personal account. (2) If profit and loss account shows a net profit, the amount is carried to the credit side of the proprietor's account. (3) If it shows a net loss the amount is carried to the debit side of his account.

If the business is owned by partners, profit and loss account is closed into their personal accounts, the net profit or loss being apportioned between them in accordance with their partnership agreement. In the case of a corporation it is customary to retain a part of the profits undivided,

and this amount is carried from profit and loss account to surplus account or whatever other name such account may bear; or it may be simply retained in profit and loss account. The amount to be divided among the stockholders is determined by vote of the board of directors. The amount to be disbursed among the stockholders is divided by the total amount, par value, of the outstanding capital stock, and the result is the percentage of the dividend declared. An account is then opened in the ledger for such dividend and headed "Dividend No. —," numbered consecutively from the first dividend declared. The amount to be disbursed is then carried from profit and loss account to "Dividend No. —" account. This closes profit and loss account. The checks are made out for the stockholders credited upon the cash account and debited upon "Dividend No. —" account, which closes that account.

The bookkeeper is now ready to prepare his statement of condition of business, or balance sheet. The assets or resources are all entered together and below them are entered the liabilities. In double-entry accounting the total amounts of the assets and liabilities will always be equal.

CHAPTER III

KINDS OF ACCOUNTS

§ 21. **What Is an Account.** An account, in law, is a statement of debits and credits between parties. "The primary idea is, some matter of debt and credit, or demand in the nature of debt and credit, between parties. It implies that one is responsible to another for moneys or other things, either on the score of contract or of some fiduciary relation of a public or private nature created by a law or otherwise."¹ A definition which has been cited in several decisions with approval is as follows: "Some matter of debt and credit, or of a demand in the nature of debt and credit between parties, arising out of contract, or of a fiduciary relation, or some duty imposed by law."² "Account is to be distinguished from balance which is but the conclusion or result of the account."³

The lawyer will be helped in many puzzling problems arising in the working out of tangles in business affairs, by adopting as a primary principle in dealing with accounts that in whatever form the account may be presented, or whichever of the various kinds of accounts the one in question may be, and however complicated the situation, at bottom the whole problem is a simple matter of debit and credit and the first step toward its solution the determination of who shall be regarded in the unraveling of the snarl or the analysis of the complication as debtor and who as creditor. Having thus chosen sides, the remainder of the process is one of classification of the items in the trans-

¹ Whitwell v. Willard, 1 Mete. 217, cited in Anderson's Law Dict., art. "Account," p. 16.

² Nelson v. Posey Co., 105 Ind. 287, *idem*.

³ Article "Account" p. 12, Shumaker and Longsdorf's Cyclopedic Law Dictionary, citing 45 Mo. 574.

actions, and grouping of debits and credits. There is no formula which will be of so much service to a lawyer in examining witnesses upon accounts as the simple one already given as the foundation of accounting: A debit is value delivered or rendered by us and is entered on the left-hand side of the account. A credit is value received by us and is entered upon the right-hand side. Debtor is the person or firm to whom value is delivered or rendered; creditor is the person or firm from whom value is received.

“While it is said that the term ‘account’ has no very clearly-defined legal meaning, the primary idea of account, *computatio*, is some matter of debt and credit, and it implies that one is responsible to another on the score either of contract or of some fiduciary relation of a public or private nature, created by law or otherwise.”⁴

§ 22. Current or Running Account. A current or running account is one which contains items of debits or credits for which settlement has not been made and to which, in so far as the account is concerned, there is no obstacle to the addition of further items, either to the debit or credit side.

The idea of a current or running account is that entries are being made upon it; in other words, that it represents the situation between persons who are having dealings with each other; who have had them in the past; are having them in the present; and are likely to continue to have them in the future.

A current or running account may be one upon which all merchandise entries appear upon the debit side and only cash payments upon the credit side, as in the case of a customer's account at a store. It may also be a mutual account, as between persons furnishing merchandise to each other, in which case there may be entries of various kinds on both sides of the current accounts.

It is often said that “we have a running account at such

⁴ *Watson v. Penn*, 108 Ind. 21 and *Nelson v. Posey Co.*, 105 Ind. 287, cited in *Cyc.*, vol. 1, art. “Accounts and Accounting,” p. 362.

a store", even though at the time we may have paid all that was due, so that we owe nothing. Technically, we have then no running account, but have at the moment rather a right or privilege to open such an account. In other words, it is contemplated, in the use in law of the term "current or running account" that the account is also an open account. When such an account is paid or settled, there ceases to be an account between the parties thereto.

§ 23. Open Account. An open account is one in which there are debits or credits unsettled between parties, and the exact amount due from one to the other has not been so ascertained and agreed upon, expressly or impliedly, as to constitute the account an account stated.

The term "open account" has been applied to current or running accounts without distinguishing between them. A single item of indebtedness owed by *A* to *B* would constitute an open account, but if it represented the only transaction between the parties, and no other transactions are contemplated, except payment of the debt, such an account would hardly be termed a current or running account. According to the customary use of the term current or running account, such use would be incorrect. On the other hand, a current or running account may with entire propriety be termed an open account, since it is of the very essence of the current or running account that something be unsettled between the parties. An open account may also be a mutual account in which entries other than of ordinary cash payments by debtor or creditor appear on both sides of the account between the parties. All mutual accounts are also open accounts unless the balance due has been so ascertained as to render the account an account stated.

On the other hand, care must be exercised in bringing a suit as upon an open account, upon a balance due where there has been a written contract between the parties, even although there has been some departure from the terms of the contract, for it may be found that such a situ-

ation will not constitute an open account between the parties, but ground for suit upon the contract.

“A demand cannot be regarded as an open account where there is a contract which is the foundation of the claim, and which, though not fulfilled according to its letter, either as to time or place of delivery, yet with the qualification which the law under such circumstances imposes, determines the respective liabilities of the parties.”⁵

An example of an open, current, and mutual account, so designated by the Supreme Court of the United States, is found in the case of *Corinne Mill, Canal and Stock Company v. Toponce*.⁶

§ 24. Mutual Account. A mutual account is one in which there are items on both sides, other than ordinary payments debited or credited in the regular course of business.

An account of a merchant with a customer containing debits of merchandise sold to such customer and credits only of payments of moneys on account, is not a mutual account. If a customer furnished merchandise to the merchant on the account, farm produce, for instance, the respective accounts would then become mutual accounts. The characteristic of the mutual account is the reciprocal debits and credits other than cash payments in the regular course of business. There may be mutual accounts where only cash is involved, as where cash loans were frequently made by two persons to each other and the items carried on ordinary book accounts. In the regular course of business dealings, however, the term mutual account means accounts where there are items on both sides other than of money paid or received on account. The legal meaning of the term has been defined in various ways:

“A mutual account is one based on a course of dealing wherein each party has given credit to the other, on the faith of indebtedness to him. If the items on one side are mere payments on the indebtedness to the other,

⁵ *R. R. Co. v. Lindsay*, 4 Wall. 650.

⁶ *Corinne Mill, Canal and Stock Co. v. Toponce*, 152 U. S. 405.

the account is not mutual. Whether or not the account is a mutual account is a question of fact.”⁷

The subject of mutual accounts is a very important one, for the reason that it has been held that the items of a mutual account, though more than six years have elapsed, may be presented in evidence notwithstanding the Statute of Limitations.⁸

The theory upon which this exception in favor of the mutual account is made, is stated in the Georgia decision to which reference has already been made:

“The doctrine that the Statute of Limitations does not begin to run against either party until the last just item is obtained on either side, does not rest on the notion that every credit in favor of one is an admission by him of indebtedness to the other, or a new promise to pay, but upon a mutual understanding, either express or implied from the conduct of the parties, that they will continue to credit each other until at least one desires to terminate the course of confidential dealing, and that the balance will then be ascertained, become then due, and be paid by the one finally indebted. Either party may terminate the mutual understanding at any time by actual payment of the balance, by stating the account for that purpose, by demanding a settlement privately, by suit, or by any other act which evinces his determination to deal no longer in that way. Without proof of its determination, the law presumes that such a mutual understanding, once proved or admitted, runs through all the dealings of the parties until the complete bar of the statute has passed.”⁹

Mutual accounts have been frequently involved in cases in which the question has arisen as to whether or not one or the other of the parties is entitled to claim interest.

“Where there are current, mutual accounts, interest does not run, in the absence of custom or agreement, until a bill is rendered or a demand made. The mere fact that an account is unliquidated is often, though not always, a

⁷ *Gunn v. Gunn*, 74 Ga. 555, 557-568, cited in *Anderson's Law Dict.*, art. “Account,” p. 2.

⁸ *Nichols v. Leavenworth*, 1 Day 245; *Nichols v. Taylor*, *idem*, 250.

⁹ *Gunn v. Gunn*, 74 Ga. 555, 557-568.

decisive objection to the allowance of interest. And the objection is much stronger where no sum has been named by either party as the amount to be charged until after the controversy has arisen.”¹⁰

§ 25. Account Rendered. Account rendered is a term applied to a statement of account presented by a creditor to his debtor. The ordinary monthly statements sent out by merchants to their customers showing items of purchases during the month, item of any balance due on the first of the month and the amount due on the last day of the month, are “accounts rendered” within the legal meaning of the term.

It is not essential that there should be more than one item. An ordinary bill giving the item of indebtedness, when presented to the debtor may become an account rendered. When the debtor does not object to the account as rendered, within a reasonable time, the account rendered is to be regarded as admitted by the debtor to be *prima facie* correct.

“The principle which lies at the foundation of evidence of this kind is, that the silence of the party to whom the account is sent, warrants the inference of an admission of its correctness. This inference is more or less strong according to the circumstances of the case. It may be repelled by showing facts which are inconsistent with it, as that the party was absent from home, suffering from illness, or expected shortly to see the other party and intended and preferred to make his objections in person. Other circumstances of a like character may be readily imagined.”¹¹

“An account current sent by a foreign merchant to a merchant in this country and not objected to for two years is deemed an account stated, and throws the burden of proof upon him who received and kept it without objection.”¹²

§ 26. Account Stated. “An ‘account stated’ is an agreement between persons who have had previous transactions,

¹⁰ Clark v. Clark, 46 Conn. 586.

¹¹ Wiggins v. Burkhams, 10 Wall. 131, 132.

¹² Freeland v. Heron *et al*, 7 Cranch 147, 148.

fixing the amount due in respect of such transactions and promising payment.”¹³

“It must appear that at the time of accounting there existed some demand between the parties respecting which an account was stated, that a balance was then struck and agreed upon and that the defendant expressly admitted that a certain sum was then due from him as a debt.”¹⁴

Such an account can only be impeached for fraud or mistake.

“When the account is admitted in evidence as a stated one, the burden of showing its incorrectness is thrown upon the other party. He may prove fraud, omission, or mistake, and in these respects he is in no wise concluded by the omission implied from his silence after it was rendered.”¹⁵

Account stated is a very important subject in the handling of accounts as evidence, as the presentation of an account stated obviates the necessity of opening up the whole account as a subject for examination. An open account requires the presentation of item after item singly, with an opportunity of cross-examination upon each item. The account stated does away with all this examination in detail in court, testimony being given upon the agreement of parties, express or implied, as to the amount finally due to one or the other.

The convenience of this method of putting in an account has caused it to be followed whenever possible. Consequently there have been a great many decisions upon cases where the point at issue has been the account stated. The law reports of almost every State will be found to contain decisions by its court of last resort, enunciating its doctrine upon this subject. The leading case is *Standard Oil Company v. Van Etten*,¹⁶ a case growing out of a contract

¹³ *Zacarino v. Pallotti*, 49 Conn. 36, head note.

¹⁴ *Idem*, citing *Abbott's Trial Ev.*, p. 458 and *Chitty on Contr.*, p. 562.

¹⁵ *Wiggins v. Burkham*, 10 Wall. 132, citing *Perkins v. Hart*, 11 Wheaton 256.

¹⁶ *Standard Oil Co. v. Van Etten*, 107 U. S. 325, citing *Perkins v. Hart*, 11 Wheat. 237; *Toland v. Sprague*, 12 Peters 300; *Wiggins v. Burkham*, 10 Wall. 129; *Lockwood v. Thorne*, 11 N. Y. 170.

made in 1873 for furnishing lumber for barrel heads. The case went up to the Supreme Court of the United States in 1882, from the Circuit Court of the United States for the Eastern District of Michigan. In August, 1875, the Standard Oil Company made up an account of the lumber received, based upon the count of its inspector, and the amounts of moneys paid the lumber dealers, and rendered that account to the latter. The balance found due was paid and accepted, and no objection made to the statement of the account until January, 1876, when suit was brought on the ground that there was mistake in the account. It was claimed on the trial that the lower courts erred in admitting the introduction of testimony to vary items making up the account, on the ground that the account had become an account stated. It was claimed, and the claim was approved and sustained as being a correct statement of the law, that "an account rendered becomes an account stated, unless objected to within a reasonable time; that what constitutes a reasonable time in such a case is a question of law; and that an account stated cannot be impeached except for fraud or mistake".

The lapse of time between the rendering of the account in September, 1875, and the date of the subsequent demand by institution of suit in January, 1876, without objection, was held to have "converted it into a stated account which could be impeached only for fraud or mistake". Evidence, however, established the fact that the inspector had made serious mistakes in the count upon which the account stated was based, and it was held that this mistake "impeached the account, for it was founded on that count and embodied its mistake".¹⁷

Another leading case involving the doctrine of an account stated is that of *Leather Manufacturers Bank v. Morgan*. The doctrine of the stated account was applied to the relation between a depositor and a bank. It has been held in other jurisdictions that the pass book which

¹⁷ *Standard Oil Co. v. Van Etten*, 107 U. S. 334.

a depositor in a national bank presents to the receiving teller each time a deposit is made, and in which that officer enters the amount of a deposit, constitutes a statement of account between the bank and the depositor, the items of deposits entered constituting acknowledgments by the bank of receipt of the amounts so entered. It has furthermore been held that when the pass book is written up and returned to the depositor with the amount of the balance on deposit stated therein, and the depositor's paid checks as vouchers for the statement of amounts paid out by the bank on the account, that the book with the account therein will become, in effect, an account stated, if the statement as rendered is not examined and objected to by the depositor or his authorized agent within reasonable time. The case above mentioned grew out of a loss sustained by Morgan as a result of payment by the bank on account of Morgan of checks which he claimed had been raised in amount after he had signed the same. The case went up to the Supreme Court of the United States on writ of error to the Circuit Court of the United States for the Southern District of New York. It was held that:

"A depositor in a bank who sends his pass book to be written up and receives it back with entries of credits and debits and his paid checks and vouchers for the latter, is bound personally or by an authorized agent, and with due diligence, to examine the pass book and vouchers and to report to the bank, without unreasonable delay, any errors which may be discovered in them; and if he fails to do so, and if the bank is thereby misled to its prejudice, he cannot afterwards dispute the correctness of the balance shown by the pass book."¹⁸

As has already been stated, the doctrine of the account stated operates to obviate the necessity of opening up the whole account by the creditor, and precludes the debtor from doing so except on grounds of mistake or fraud. The result is that the account stated becomes, in reality, a new cause of action.

¹⁸ *Leather Manufacturers' Bank v. Morgan*, 117 U. S. 98.

CHAPTER IV

BOOK ACCOUNTS AS EVIDENCE

§ 27. In Class of Exceptions to Rule Excluding Hearsay. Admissibility of documentary evidence, including entries in account books, is treated as a branch of the subject of exceptions to the hearsay rule.

Admissibility of entries in account books may come under one or the other of two classes of admissible entries, depending for admissibility upon one or the other of two sets of circumstances, namely, entries made by a person since deceased and admissible as entries of a deceased person, or entries made by a party to the action, whose testimony will be given in court.

§ 28. Rule Excluding Hearsay. Rules of evidence require that facts shall be proved by the best obtainable evidence, and that the opposite side shall have an opportunity in open court to test such evidence by cross-examination. *A* has been employed as a bookkeeper for *B*, and as such bookkeeper entered charges in *B*'s daybook or sales book against *C*, representing merchandise purchased and received by *C* from *B* which was not paid for. *A* dies before suit is brought by *B* against *C*. On the trial of the suit *B* presents his book account against *C* as evidence of the debt claimed. Under the regular rules of evidence the book account would not be admissible since, so far as it goes, it merely represents that *A* said in writing that certain articles were sold on certain days to *C*, and there being no entries upon the cashbook saying that payment was made by *C*, it is asked that the inference may be drawn that according to *A*'s statement, left after his death, *C* owed *B* for such articles of merchandise. Regular rules of evidence say such testimony is inadmissible because it is mere hearsay, that is, *A* says the fact is so, but *A* is not

brought into court to testify to the fact in order that *C* may cross-examine him to test the probability of the truth of the statement. This test of cross-examination would include examination as to *A*'s connection with the facts to which he was testifying; his demeanor while testifying, in respect to the impression given of truth or otherwise; questions as to the time and circumstances of making the entries and other matters of inquiry which might be suggested from a personal examination of the witness.

Written statements, as such, are not entitled to admissibility in evidence under the exception to the rule excluding hearsay, any more than oral statements. Certain classes of writings have been admitted on the grounds of necessity or policy. So far as this exception relates to entries in account books, the grounds upon which such favor has been accorded entries of this nature will be explained in this section.

§ 29. History of Rule. Originally, in England, hearsay statements were not excluded. The present rules of evidence were unknown at that time. Questions of fact were put to the jury from early in the fourteenth century. The function of the jury was then, as now, to find the truth of the point at issue. However, they were not, as now, furnished with testimony pro and con in court, upon which they were bound to decide the matter in litigation under rules of law laid down by the judge. Their duty included the taking of testimony wherever it could be found. The jury were taken from the neighborhood where the controversy arose, under the theory that it was likely that some of them at least already had personal knowledge of the facts involved. Under such circumstances, it hardly needs to be said that there was no rule excluding hearsay statements. At that time, entries in account books were admissible. They continued to be admissible without restriction, so far as we know, until the year 1609. During the intervening years there had been a considerable development of rules of procedure in court trials. Experience had shown the value of personal, oral testimony in open court,

where judge and jury could observe the conduct and apparent character of the witness and his testimony could be subjected to the testing of cross-examination. At the commencement of jury trials witnesses rarely gave their testimony in open court. By the year 1609 this custom had changed, so that evidence was laid in by testimony produced in court, as now.

Naturally, precedents were established and rules promulgated for admission of evidence found by experience to be of probable value in aiding the jury in arriving at a true solution of the controversy. During the next sixty or seventy years hearsay statements were regarded as admissible but with some question as to its weight as evidence; and finally we are told that, about the years 1675 to 1690, "by general acceptance the rule of exclusion had now become a part of the law as well as of the practice."¹

§ 30. First Restriction on Use of Book Accounts as Evidence. In the year 1609, was enacted the statute 7 James I., An Act to Avoid the Double Payment of Debts, of which chapter 12 is as follows:

"Whereas, divers men of trades, and handicraftsmen keeping shop books, do demand debts of their customers upon their shop books long time after the same hath been due, and when as they have supposed the particulars and certainly of the wares delivered to be forgotten, then either they themselves or their servants have inserted into their said shop books divers other wares supposed to have been delivered to the same parties, or to their use, which in truth never were delivered, and this of purpose to increase by such undue means the same debt; (2) and whereas, divers of the said tradesmen and handicraftsmen, having received all the just debts due upon their said shop books, do oftentimes leave the same books uncrossed, or any way discharged, so as the debtors, their executors or administrators, are often by suit of law enforced to pay the same debts again to the party that trusted the said wares, or to his executors or administrators, unless he or they can produce sufficient proof by writing or witnesses, of the said payment, that may countervail the credit of the

¹ 2 Wigmore on Evidence, § 1364.

said shop books, which few or none can do in any long time after the said payment; (3) be it, therefore, enacted by the authority of this present Parliament, that no tradesman or handicraftsman keeping a shop book as is aforesaid, his or their executors or administrators, shall after the feast of St. Michael the Archangel, next coming, be allowed, admitted, or received to give his shop book in evidence in any action for any money due for wares hereafter to be delivered, or for work hereafter to be done, above one year before the same action brought, except he or they, their executors or administrators, shall have obtained or gotten a bill of debt or obligation of the debtor for the said debt, or shall have brought or pursued against the said debtor, his executors or administrators, an action for the said debt, wares, or work done, within one year next after the same wares delivered, money due for wares delivered, or work done.

II. Provided always, that this act, or anything therein contained, shall not extend to any intercourse of traffic, merchandising, buying, selling, or other trading or dealing for wares delivered or to be delivered, money due or work done or to be done, between merchant and merchant, merchant and tradesman, or between tradesman and tradesman, for anything directly falling within the circuit or compass of their mutual trades and merchandise, but that for such things only, they and every one of them shall be in case as if this act had never been made; anything herein contained to the contrary thereof notwithstanding.

III. This act to continue to the end of the first session of the next Parliament and no longer.”²

By subsequent continuances, this statute has been continued in force, down to the present time.³ This early Statute of Limitation shows that at that time book accounts were of common use in evidence in the English courts. Doubtless, book accounts were as freely admitted in evidence in the American colonial courts, for in 1645 Plymouth Colony enacted a statute reciting:

“Whereas, many inconveniences, losses, and great controversies have and do daily happen by reason of pretended

² See the statute in full in Thayer, “Cases on Evidence” (2d ed.) 507, 508.

³ *Idem*, 508.

debts, sometimes just and sometimes satisfied, the charge remaining still uncanceled, sometimes upon books, sometimes by papers, whereas in truth there is little or nothing really due or remaining, but through long neglect of demand, and sometimes slow payment made, much contention doth arise betwixt party and party; it is, therefore, enacted by the court, that if any man which either formerly hath dwelt or now doth dwell within this government, have any debts now owing upon book or by papers or such like scrolls, and are not demanded within the space of six months next after the first day of November next, such books, papers, or scrolls shall be no evidence upon trial or recovery of them. And for time to come a book, paper, or scroll shall be evidence for the space of one year after the making of the debt therein specified or written, and no longer, except the same be otherwise proved, but for such as go long voyages to sea to be allowed two years.”⁴

In 1682, in the same colony a statute was enacted which is not only a statute of limitations, giving a creditor four years in which to bring his action, but, further, it expressly makes his book account lawful evidence:

“Whereas, divers merchants, shopkeepers, tradesmen, and handicraftsmen have traded, sold, and trafficked their goods, wares, and merchandise in private, and their customers often sending for such things as they need by children and servants under age, etc., whereby such merchants, shopkeepers, and tradesmen have no opportunity to take bonds, bills, or witness of the delivery of their goods, yet, just it is that such dealers should be duly paid for their wares and merchandise. It is, therefore, enacted, that all and every merchant, shopkeeper, dealer, etc., shall keep a book of their dealing and trading, fairly writing down therein both debt and credit, and the said merchants, their factors, or servants, or any of them that shall deliver any such wares or merchandise making oath that the said book of accounts is true both for debt and credit; such book of accounts shall be held sufficient in law for the recovery of any debt within four years after the delivery of any such goods; but if the defendant will take his oath that he had not those goods charged in the book or account, or that he hath paid for the same, then the case shall be tried and deter-

⁴ Plymouth Colony Laws, 77, 78, in Thayer, “Cases on Ev.” (2d ed.) 516.

mined according to the best and strongest presumptions the parties concerned shall produce.”⁵

§ 31. Rise of Exception to Hearsay Rule in Favor of Book Accounts. At the commencement of the exception to the rule excepting book accounts from the hearsay rule, there were two grounds upon which such evidence was admitted. First, where a bookkeeper who made the entries had died, it was manifestly impossible for the creditor to have the advantage of his regularly-kept books as evidence in suit upon debts therein recorded, unless presence of the bookkeeper in court to testify to the entries in his handwriting was excused. Real necessity called for some relaxation of the rule in such cases, and the courts responded by prescribing proof of the handwriting of the deceased clerk, of his employment, his duty with regard to making such entries, and affording the defendant an opportunity to examine the account as to its appearance of apparent regularity, etc. Second, since a party could not testify for himself, and it often happened that a shopkeeper would be entirely unable to prove a debt, his own testimony being excluded, unless his account books could come in, a custom arose of admitting the account books of a shopkeeper in his behalf, by allowing the clerk who made the entries to use the books on the witness stand. In England, in the time of Blackstone, while the plaintiff could not testify for himself on the trial, neither could he make evidence in his own behalf by use of account books he himself had kept. But if he had a clerk or a bookkeeper, who made the entries, the books could be used as stated:

“Books of accounts or shop books are not allowed of themselves to be given in evidence for the owners, but a servant who made the entries may have recourse to them to refresh his memory; and if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence; for as tradesmen are often under a necessity of giving credit without any note or writing, this is, therefore, when accompanied with such

⁵ Plymouth Colony Laws 196, *idem*.

other collateral proofs of fairness and regularity, the best evidence that can be produced.”⁶

After the time when plaintiffs were first permitted to testify in their own behalf, by using their accounts to refresh their recollection on the witness stand, the necessity for admissibility of the accounts themselves was obviated wherever plaintiff could personally testify to the items.

In America, from early colonial days, entries in account books have been favored in evidence. Reference has already been made to two early statutes of Plymouth Colony, the earlier of which shows that admission of book accounts in evidence was customary, the latter expressly making such entries admissible.⁷ The other Colonies early enacted statutes relating to the same subject. In Connecticut, a special action of “book debt” was in use:

“It is a general rule of law that no man shall be a witness in his own case; but to this there are sundry exceptions in civil cases, on the ground of necessity. The parties are admitted as witnesses in actions of book debt by force of statutes.⁸ This provision of the statute is grounded on the necessity of the thing for, in many instances, it would be very difficult to obtain any other or better proof; but as this action is very common, and as there is a great danger in allowing a party to support a claim by its own oath, the law has provided every possible check and guard against false accounts, and has restrained the action within the narrowest limits possible. It is confined to such articles as are usually charged on book, and the book ought to be kept in a fair and regular manner and the articles truly entered at the time of the delivery or the performance of the service, so as to be consistent with and support the oath of the party; for the book is to be considered as the essential part of the evidence, and the oath of the party as supplementary to it.”⁹

⁶ Bl. Comm., (Cooley ed. 1884) Book III, 368.

⁷ See statutes in Thayer, “Cases on Ev.” (2d ed.) 516; Plymouth Colony Laws, 77, 78, 196.

⁸ Stats. (Day’s ed.) 101.

⁹ Swift, “Evidence” (1810) 81.

The Supreme Court of Connecticut, speaking upon this subject in 1853, said:

“In this State, from its earliest judicial history in actions on books for the recovery of the price of articles usually sold on credit and charged by merchants, laborers, and farmers on their account books, these books not only have been admitted on the trial, but, omitting exceptional cases, have been required as furnishing the principal and most satisfactory evidence; and this not merely in aid of the recollection of the party or his clerk. . . . There is a necessity for this, and it has been felt by every business community, as is proved by the laws and usages of various commercial states and nations, by which the books of merchants and others are, to a greater or less extent, relied upon by business men and courts of justice. Bookkeeping, even, has become a matter of study and science, growing out of this necessity and these usages. It is not within the power of memory to recollect the delivery of every article sold and charged on book in the usual course of dealings, and it is not expected either by the vendor or purchaser; and the very fact that the customer of a merchant receives a credit upon his books by way of a known account current, furnishes evidence that he consents that these books shall be used as a sort of record-proof of the sale and delivery of the property charged upon them—a part of the *res gesta* of the delivery, the credibility of which depends upon the appearance of the entries, the manner and usage of the bookkeeping, and the general correctness of charges as proved by corroborative evidence.”¹⁰

A great American judge has written thus upon the rise of the principle of admissibility of account books as evidence:

“Another exception to the hearsay rule exists in the case of entries made in the shopbook of a party to the suit. This exception is an ancient one and was well known at the beginning of the eighteenth century. It has a history of its own which it is not necessary to give in detail here. From an early period, entries in such books of matters relating to the business or trade of the shopkeeper had been admitted under divers restrictions. At a time when parties to a suit

¹⁰ *Butler v. Cornwall Iron Co. et al*, 22 Conn. 359, 360.

could not be witnesses in it, this kind of evidence was of great importance. During the eighteenth century and the first half of the nineteenth, the reception of such evidence was hedged about with limitations and restrictions which varied somewhat in each jurisdiction. Today this exception prevails almost everywhere in some form or other, although the necessity out of which it grew—the disability of parties to testify in their own behalf—has long since been removed, and most of the limitations that formerly conditioned the reception of such evidence no longer exist. The trend of development in this country, as to this exception, has been steadily in the direction of its enlargement, so as to embrace books of account kept by anyone, and to permit the use of such books in evidence unhampered by technical rules that no longer serve a useful purpose.”¹¹

Greenleaf bases the reason for admitting such entries upon the *res gestæ* principle:

“Though this evidence has sometimes been said to be admitted contrary to the rules of the common law, yet, in general its admission will be found in perfect harmony with those rules, the entry being admitted only where it was evidently contemporaneous with the fact, and part of the *res gestæ*. Being the act of the party himself, it is received with greater caution, but still it may be seen and weighed by the jury.”¹²

§ 32. Admissibility of Account Books as Evidence. The question of the admissibility of entries in books of account is always a question of law for the court to decide.

§ 33. Entries Must Be Made in Regular Course of Business. The entries must have been made in the regular course of business. The entries must pertain to some business or occupation or transaction wherein records of debits and credits are customarily carried upon book account. The law does not restrict to mercantile transactions the right to use of such entries as evidence, but there are limits within range of which the transaction in question must be classified. There is no question regarding the admissibility

¹¹ Chief Justice Torrance, “Two Centuries Growth of American Law,” Yale Bicentennial Publications, Scrib. (1901) 327, 328.

¹² Greenleaf on Evidence, Vol. I, p. 118.

of items in an ordinary sales and purchase account in store or factory, nor of entries in time-book or other record of services performed. On the other hand, where a written contract is concerned, the contract itself is the proper documentary evidence, and a book account is not admissible. It has been held in some jurisdictions that a book account is not proper evidence in a suit on money loaned, since it is customary to take promissory notes in such transactions, and notes or admissions of obligations should be presented in evidence of such a debt. In regard to such transactions it should be said that in other jurisdictions it has been held that book accounts may be admitted in suits on money loaned. Whenever it is customary to carry on book account records of debits and credits between the parties in such transactions as the one in controversy, and these entries are the only documentary evidence of the debt, such entries may be fairly assumed to be admissible in evidence.

34. Preliminary Proof of Authenticity. Preliminary proof is always required. In some jurisdictions statutes prescribe the nature of this proof. It is always necessary to connect the books with the subject of the controversy. Where the entries were made by a bookkeeper and he is living and available, he will be expected to testify that the books are the regular account books of the party; that they are kept in the regular course of business; that he is the bookkeeper and as such bookkeeper, in the regular course of business and in line of his duty, he made the entries on the account; and that the entries are true and in each instance were made at or near the time of the transaction. In every jurisdiction there develops a sort of stereotyped form of procedure on proof, where it is not specially provided by statute, with which the student should familiarize himself in his own jurisdiction.

§ 35. Entry Must Be Made at Time of Transaction. Attention has already been directed to a quotation from Greenleaf,¹³ where it is stated that the entry is admitted

¹³ *Idem*, footnote 30.

because it was contemporaneous with the fact in issue and a part of the *res gestæ*. It is believed that this criterion will assist the student in determining upon the admissibility of such entries, more than any other test in regard to time when the entries were made. Let us ask: Were the entries, if not made at the moment of the transaction, made at such a near time afterward as to become a part of the *res gestæ*? The rule is, that the entries must be contemporaneous, but this does not mean instantaneous. A leading case often referred to upon this point is *Chicago and Northwestern Railway Company v. Ingersoll et al.*, where the railroad company was sued for non-delivery of a quantity of wheat and barley. The railroad company set up in defense to the claim upon the barley that it was delivered into a grain elevator designated by the agent of the plaintiff in accordance with his instructions on Saturday, Oct. 7, 1871. The elevator was burned in the Chicago fire on Sunday, Oct. 8, or Monday morning, Oct. 9. The success of the railroad company's defense would depend largely upon getting in evidence the entry in the book of the foreman in charge of receiving grain at the elevator on the day it was claimed the grain was delivered. The appellate court held that the entry was admissible. Quoting from Greenleaf on Evidence in regard to entries of the class of the one in question, the court said:

“The other class of entries consists of those which constitute parts of a chain or combination of transactions between the parties, the proof of one raising a presumption that another has taken place. Here, the value of the entry as evidence lies in this: that it was contemporaneous with the principal part done, forming a link in the chain of events, and being part of the *res gestæ*. It is not merely the declaration of the party, but it is a verbal, contemporaneous act belonging not necessarily, indeed, but ordinarily and naturally to the principal thing. It is on this ground that this latter class of entries is admitted; and, therefore, it can make no difference, as to their admissibility, whether the party who made them be living or dead, or whether he was or was not interested in making them, his interest going only to affect the credibility or weight of the evidence when

received. We are of opinion that the evidence offered under the circumstances of this case falls within the latter class defined by Greenleaf, and was admissible for all it was worth. The weight of a piece of evidence offered forms no criterion of its admissibility. If, in any point of view, it has any tendency to prove any point in issue, and is otherwise competent, it cannot be excluded because the tendency is but slight. Many such entries are capable of explanation by applying to them evidence of the usage and customs of the business." ¹⁴

The question of what constitutes such a delay in making the entry after the transaction as to debar the entry from admissibility, is continually arising. Every case is judged by its own circumstances in this regard. What constitutes a reasonable time in one set of circumstances may be unreasonable under other circumstances. In some cases, delay of a day in making an entry has been held not unreasonable. Delay of a week has been held unreasonable and the entry excluded. The digests and law encyclopedias give long lists of cases involving this subject. It is a constantly recurring one, and the most that can be said is that an entry to be admissible should have been made within such a time after the transaction as to give it place among the *res gestæ* of the transaction. There is involved the nature of the transaction, the situation of the parties and their experience and customs in transactions of the nature of the one in controversy; likelihood of a correct entry, and other similar tests.

§ 36. Must Be Original Entry. The point here involved is that which under the rule of evidence calls for the best evidence available. The rule in presenting documentary evidence is that the original must be produced if available, and if it is impossible to produce the original, the reason for non-production of the original must be given, in which case secondary evidence which may be admissible or may not be admissible, may be offered with proofs of its correctness.

¹⁴ C. & N. W. R. B. Co. v. Ingersoll et al, 65 Ill. 399, 404-405.

The rule is, that in entries in account books the original entry is the only entry admissible in evidence. This entry is usually the entry in the daybook or sales book, where the suit is to recover payment for goods sold and delivered. In business establishments engaged in wholesale trade or manufacturing and employing traveling salesmen, since the adoption of loose-leaf methods of bookkeeping many companies have introduced a form of order blank, supplies of which are taken on the route by the salesman. These sheets are sent in to the company, one sheet for each order, with the blanks filled in by the salesman who took the order, in his handwriting. The order-sheets on arrival are turned over to the shipping clerk who fills the order, checks shipping marks upon the sheet and passes it to the billing clerk who, after making the price extensions and the bill, sends it on to the bookkeeper. Here the sheet is placed in a binder, serial numbers stamped upon it, and the entry is posted to the ledger. Where this system is in use, no question can arise as to what constitutes the original entry of the transaction. The order-sheet becomes successively shipping list and sales book page, and remains the permanent sales book entry of the transaction.

While it is true that only books of original entry are available for use in putting in entries in evidence, yet the ledger may be of use in the court room during the trial, and may be taken upon the witness stand by the bookkeeper as a guide or index to the pages in the book of original entry where the transactions involved are to be found.

The rule requiring that the entry be the original entry, seems to mean that it be the original permanent entry, or the original entry intended to stand as the permanent charge of the item. This point is frequently arising in instances where there was some temporary memorandum made at the moment of the selection of the goods, or performance of the duty or other fact in issue which was later transferred to some book or paper and the original destroyed. There are many suits reported in which one

of the points on which the cases were carried to the appellate courts was on the admission or exclusion of entries which had been copied from original memoranda on boards or shingles or slates or sides of wagons or waste pieces of paper, and the original wiped out or thrown away.

In the decision of this point every case must be governed by its own circumstances. What constitutes admissible evidence is always a question of law for the court to decide. In a Massachusetts case which will be referred to later, teamsters carting sand chalked a mark upon the sideboard of the cart for each load drawn. Each night the number of loads drawn was reported to the owner of the teams. He verified the report by count of the marks on the cart and made a like number of marks in a memorandum book in the presence of the teamsters, and washed off the chalk marks on the cart. The court held that the marks so copied into the memorandum book were admissible as original entries.

There is an interesting case upon this point in the New Hampshire reports, which is frequently cited in briefs on this subject. The quantity of timber which one Ellison drew was in dispute. It was proved that said timber had been got out and molded by a gang of men under one Raitte, and then surveyed by him, and the contents of each stick marked upon the end with red chalk. Ellison testified that in drawing he passed by his own house, and as he drew each load he took down upon a slate the quantity in each stick, and added up the several quantities and gave their sum to his wife or daughter, who entered it in his presence upon a memorandum book, and he then looked at the entry upon the book and saw that it was correct. Eight loads were thus entered upon the book, three by his daughter and five by his wife. He could not recollect the amount in either load. The court ruled that the entries in the book were competent, and they were read to the jury. The wife and daughter were afterward introduced, and they confirmed the testimony of Ellison and testified that they put down the sums as he gave them,

and after each entry compared it with the slate and found it to agree with the slate. It appeared that the figures upon the slate were not preserved, but were rubbed out after their sum had been carried to the book. The appellate court held that the memorandum book was admissible. "It was so far an original entry as not to be objectionable on account of the transfer of the entries from the slate."¹⁵

§ 37. Form of Entry. Technical accuracy in form of entries is not required for their admissibility as evidence. Obviously, it would be impracticable to insist upon certain forms, or even upon a general following of some system of entry, as cases are constantly being tried in which the party had no other bookkeeper and knew nothing about approved methods of bookkeeping.

The most that can be required in all cases is that the entries be such that they are intelligible to the court and jury in the light of the explanations given by the party offering the same. Courts take judicial notice of the varying degrees of education of our people. A manifest regularity and apparent honesty of intent in making the entries is of more importance than anything else. There is an interesting case in the Massachusetts reports illustrating this point. Miller made a contract to furnish Shay sand to be used in building. The suit was to recover for two hundred and fifty-three loads of sand. Miller was unable to write and could read but little. He delivered some of the loads of sand himself. He offered in evidence a memorandum book. He testified that each time he delivered a load of sand to the defendant he made a mark in his book. Two teamsters working for him also delivered some of the loads, and he and they testified that when each load was delivered by them they made a chalk mark upon the side of the cart and at night reported the number of loads to Miller and he made a mark for each load in his book. The court holding that the entries in the book were admissible rendered the following opinion:

¹⁵ Pillsbury v. Locke, 33 N. H. 97, 103.

“The small account book kept by the plaintiff showing the number of loads of sand delivered, was properly admitted in evidence. It was a rough and imperfect book of account, but it was honestly kept and was the record of the daily business of the plaintiff, made for the purpose of establishing a charge against another. Such a book, supported by the oath of the plaintiff, is competent, though the account was kept only by marks, the plaintiff being unable to write. These entries are intelligible and no more liable to fabrication than other entries. It is a book of original entries, though the marks were transferred from marks made on the cart by the servants of the plaintiff who delivered the sand.”¹⁶

In the lower courts this matter is continually arising where suits are being tried involving small amounts, such as actions on grocery bills, on wages due, moneys due for job work, etc. The parties are often unable to speak our language very well or to write it, sometimes unable to write in any language except such as that used in the book in the Massachusetts case above referred to. It is the duty of our courts to give parties the benefit of all the legal remedies they are in justice entitled to. Sometimes resort must be had to an interpreter to translate spoken language in order that the entries offered may be understood as the party intended. If they appear to have been honestly made, and if they constitute a series of charges against another person and are relevant to the matter in issue, they will not be excluded simply because of the fact that the maker did not understand the science of book-keeping.

In a Delaware case, a notched stick was held to constitute a sufficient account to be entitled to admission in evidence.¹⁷ Marks on boards, shingles, slates and book covers have been admitted in evidence. In one opinion in a case where this subject was involved, the court said that there was no apparent reason why the side of a barn door might not be admitted if it showed numbering marks of loads

¹⁶ *Miller v. Shay*, 145 Mass. 163.

¹⁷ *Rowland v. Burton*, 2 Harr. (Del.) 238.

delivered into the barn, and testimony to the accuracy of the marks were properly presented.

§ 38. Delays in Making Entry. In this connection attention should again be drawn to the requirement which has already been explained in section 35. When the form of the entry is such that it has apparently been transferred from other memoranda, the question always arises as to the time when the transfer was made and the likelihood that as transferred it constituted a correct statement of the original charge. In this, as in other matters involved, every case must be judged by its own circumstances. Certainly, an entry prepared for use in court and made after the controversy had arisen, would be excluded. It is contemplated in allowing the use of written memoranda that at the time it was made it represented the charge by one party against another, uninfluenced by an immediate purpose to use it as evidence in a suit at law. Delay of a few hours may be ground for excluding entries; delay of two or three days has been held in some cases not ground for excluding the entries. The first entry made must always be so near the time of the fact in question as to come within the *res gestæ*. The effect of lapse of time before a copy offered in evidence was made from the first entry, is a question to be decided by the court in view of all the circumstances in each case.

§ 39. Erasures and Alterations. Erasures and alterations in an account offered in evidence will not necessarily require exclusion of the entries from admission in evidence, but they create a suspicion as to the honesty of the entries, and may lead the jury to throw such accounts out of consideration as unworthy of any weight as evidence. If the account has been so altered as to be apparently dishonest, it is not admissible. If there are many erasures and the account appears to be made up anew, even although the plaintiff testifies that the changes are only corrections in errors made in entering the items, the better course seems to be to draw the line of exclusion and require the party to prove the facts by other testimony.

In this connection it is of assistance to remember that the law requires that the entry be the original permanent entry. If a party has corrected his original entry, or has altered it so that it is no longer the original entry, he has no one else to blame if his account is excluded by the court. Where there are errors in the original account, the proper way in which to handle the situation is to let the entries stand as they are originally made, and when the account is laid in evidence the errors may be pointed out and allowances made for the same in the amount claimed. An attorney should never suggest nor allow any changes of any kind whatever to be made in a book account after the same has been submitted to him for use in court. It is better that there be some involuntary error which must be called to the attention of the court and jury on the trial, than that the account be submitted showing erasures and alterations.

Wherever there are erasures or alterations in an account they may be inquired upon by the opposite side. An erasure capable of being explained in such a way as to take away suspicion of its honesty will not operate to the exclusion of the account. Where such erasure was made by suggestion of the attorney for the party, or with his knowledge, and after the controversy has arisen, it throws a color of suspicion on the whole account, and places the case of the party in suspicion with the jury. In many of the larger business establishments, there is a rule that there shall be no erasures of any sort whatever upon any book accounts. If a bookkeeper makes an error in entering an item, writes a word or enters some figures wrongly, instead of erasing the wrong word or figures, a red line shall be drawn through the erroneous entry and the correct word or figures interlined just above the wrong entry. This method obviates the necessity for erasures, and the account shows on its face the whole entry with all changes. Any alteration in an original entry gives rise to questions concerning the integrity of the testimony offered, and counsel should fortify their evidence in such cases, where possible

and desirable, by personal testimony to the facts in question.

§ 40. Form of Account Book. It is not required that the account book offered be of any stated form, nor that the ruling on the pages be such as is customarily used and under the rules of proper bookkeeping would be used, for such entries as are offered in evidence.

The cases upon this subject lay down the rule that the book must be the account book of the party. But just what constitutes an account book is a subject on which there is a great deal of diversity of opinion, and cases will be found where memoranda in similar situations have been admitted in some courts and excluded in other courts. Memorandum books have been frequently excluded on the ground that they were not account books. In other cases they have been admitted on the ground that they were account books. As has been stated, even entries on shingles and boards have been admitted. The test seems to be as to the honesty of the entry, and the intent to constitute it the record of a charge against another party. Ordinarily, the book of original entry, sales book or cashbook contains pages ruled in what is known as journal ruling, having a head line at the top of the page, date columns at the left, and dollars and cents columns at the right of each page. This is the ruling of the daybook which was the original of the original entry books. However, if the account book offered was without ruling on the pages, or if the ruling was that known as ledger ruling, it would not, on this account, be excluded. "It is not necessary that a book account should be kept in any particular form, though it may affect its credit that it is kept in such form." In this case a lawyer's account book was offered after his death in proof of his claim against the defendant. It was objected to, on one ground, that it was kept in ledger form. The appellate court held that it being a book of original entry, it was admissible.¹⁸ On the other hand, an account offered in ledger form, if not shown to be an original entry,

¹⁸ Wells v. Hatch, 43 N. H. 243.

is not admissible. "Standing alone, and unsupported by any other testimony, the so-called book account against Oscar Huston as contained in the ledger of Robert Huston" was incompetent. "It does not purport to be a book of original entry."¹⁹ Whenever a question arises as to the admissibility of entries in books not customarily used for such purposes, it would seem that the test might be laid down as follows: Are the entries in this book such in all respects, that if presented in such form as such entries are customarily made, they would be admissible? If so, it would seem that they should be admitted, whether the book be in form a daybook with journal ruling, a ledger used for original entries, or any other ruling, or no ruling at all.

The question arises again in another manner when the form of the book itself is objected to. This objection is directed toward the use as an account book of anything except a bound book. Loose sheets of paper have in some instances been admitted as an account book; in other cases they have been excluded. When the present day loose-leaf systems of bookkeeping came into general use in the early '90s, contests were waged everywhere regarding the admissibility of entries on original charge sheets simply retained in binders. It was contended that admissibility was granted original entries because an opportunity of cross-examination was afforded as regards regularity of entry, and there was no safeguard against insertion of sheets at any time in such loose-leaf binders. However, the courts held that such entries were subject to the same tests on cross-examination as those in permanently bound books, and held that the fact that the book of original entry consisted of loose leaves held together in a binder, did not deprive it of the character of an account book which was admissible in evidence. Comparison of the paper in color and appearance with the other sheets in the binder; comparison of the ink upon the entry offered with the other entries; comparison of handwriting, and other tests have been deemed sufficient

¹⁹ Huston's Estate, 167 Penn. St., 219.

to guard against abuse of the privilege of placing such account books in evidence.

On the other hand, it will sometimes happen that an account book with entries presenting every appearance of genuineness and good faith, will be successfully attacked upon some extraneous ground. The writer tried such a case a few years ago, in which his client presented an account book containing more than a hundred pages of accounts, apparently in proper form in all respects, and nothing about the accounts to create suspicion. The client told the writer the story of a daughter in the family acting as bookkeeper, making the entries in this book each evening on reports to her from her father. The writer went into court without any idea that the book was other than as represented. The opposing attorney was advised by his client that to his knowledge the plaintiff had no account of the sort a few months previous to institution of the suit, and certainly the account was written up long after the transactions occurred. The defendant brought an expert blank-book maker into court, who examined the book during recess, and declared that to his personal knowledge the book was not in existence at the time of the transactions purporting to be recorded therein. On the witness stand the expert showed comparisons in natural discoloration of leaves in books of the same kind used in substantially the same manner as it was testified the book in question had been used, comparisons of wear and tear on the cover and binding, and finally wound up by testifying that he worked in the paper factory making the paper composing the pages at the time the water-mark therein was used, and that that mark was not used until at least two years after the time covered by the entries in the book. The writer procured another expert to rebut these statements, who instead of contradicting them, in private consultation confirmed everything the other expert had said. The writer's client lost his case. After the trial, the writer learned that the book had been bought in a department store a few months before the trial and the entries written

in at different times so that there might be a variation in the color of the ink on the pages to give the entries the semblance of genuineness. Clients do not generally willfully mislead or deceive their counsel in such matters, but this incident has been related here to illustrate a word of caution which it is deemed necessary to give in regard to the handling of accounts as evidence. Counsel should carefully examine the books and entries before the day of the trial and thoroughly examine his client as to the persons who have made the entries, their present whereabouts, their availability to give personal testimony in court, or the necessity for taking their depositions elsewhere. Accounts, attempted to be laid in as evidence and excluded by the court, do more harm than any benefit from their presentation can offset, and should be kept out of court. No words of advice in giving this word of caution could be too strong. More cases are lost through inefficient and faulty preparation than from any other one cause, and documentary evidence of any sort in the hands of the adversary becomes a dangerous instrument if there are in it vulnerable points.

§ 41. Admissibility of Testimony of Expert Accountant. It frequently happens that a cause of action involves a large number of transactions, extending over some considerable period of time, bringing under review mutual accounts running back several years. In such instances, the trial of the case might consume an unreasonably long time if the parties were to be obliged to present their evidence on book accounts in open court, item by item. The court has power to admit testimony of a qualified expert accountant in cases where such procedure seems warranted by the circumstances.

“When the facts sought to be proved are of such character (such as could have been ascertained by books of account), and the books or accounts are voluminous, so that the examination of each item during the trial would consume much time and it would be difficult for the jury to understand the accounts, or make the necessary computation, the court in its discretion may permit a competent witness who has

examined the books with reference to the point sought to be established to testify to the result of such examination, or to present schedules verified by his testimony, showing the details of the computation to be made. But in such cases, unless there is some legal excuse for not producing the books of account from which the witness has obtained the results testified to, they must be produced, if required by the opposing party, for examination, or to enable him to cross-examine the witness.”²⁰

§ 42. Depositions on Book Accounts. By statute, provision is made for taking depositions in cases where witnesses live more than a stated distance from the place of trial, and a deposition is sometimes resorted to in cases where a former bookkeeper's testimony is desired and it is doubtful as to whether or not he can be had at the trial. Where such a deposition is taken, either the deposition must be relied on for that testimony, or the bookkeeper's presence in court must be procured. Both cannot be used. “A deposition giving testimony regarding accounts on book is not admissible where the witness himself is present in court, ready and willing to testify in the case.”²¹

§ 43. Entries Made Admissible by Statute. Where the person who made the entries has since died, provision is everywhere made by statute allowing such entries to come in as evidence as memoranda left by deceased persons. In a case illustrating the working of such a statute it appeared that the deceased made a memorandum on a slate two days after a conversation regarding the matter in issue “and subsequently made another upon paper, which is the one offered in evidence. The statute (in Connecticut) is quite comprehensive; it puts no limit to the number of memoranda which a man may make and leave behind him concerning a particular transaction. As many as he leaves are admissible in evidence, each for what it weighs. Every memorandum so left is an original and it is admissible by reason of its own existence; not because it is the first of a series, nor because it is a copy of a pre-

²⁰ *Elmira Roofing Co. v. Gould*, 71 Conn. 631, 632.

²¹ *Handy v. Smith*, 77 Conn. 166.

vious one, but simply because the deceased made and left it. If there be several memoranda concerning the same transaction, and each varies from every other, or if all are in exactly the same language—all are alike admissible and counsel will draw such inferences from and base such arguments upon the variance or the coincidence as the facts will support. Therefore, as the relation of original and copy is not established by statute between the memorandum on the slate and the one upon paper which was offered in evidence, the law which governs that relation is not applicable here. Nor does the statute put any limit to the length of time which may elapse between the doing of an act and the making of a memorandum concerning it. Days, weeks, even years may intervene. If made and left, it must be admitted and weighed in view of all the circumstances attending it.”²²

Statutes similar to the one in Connecticut under which the Craft's case just referred to was decided, are now in existence in most of the States. The rule admitting memoranda of deceased persons is well settled in the law of evidence.

§ 44. Entries May Be Used to Refresh Party's Recollection. Much of the discussion found in the decisions of cases involving the admission or exclusion of accounts is now obsolete, as the privilege of a party to testify for himself wrought an entire change in the situation as regards the getting of his book accounts into evidence in court. He can now take his accounts upon the witness stand and refer to them “to refresh his recollection”.²³ Instead of asking their admission as a privileged class of exceptions under the hearsay rule, he now verbally testifies to the transactions, incorporating in his testimony all that his accounts contain that is relevant to the issue. The cross-examination covers any or all parts of his testimony including that part relating to the account. Instead of standing at the bar, excluded from the privilege of saying a word in his

²² Craft's Appeal from Probate, 42 Conn. 146, 153, 154.

²³ 2 Wigmore on Evidence, § 1560.

own behalf in regard to the merits of the controversy, praying that his book accounts may be received to speak for him, the party now enforces and supplements all that his books can do for him by his own statements and explanations, and has the opportunity of using all the evidence he has in book accounts, where such accounts are apparently honest and kept in the regular course of business.

APPELLATE COURT PROCEDURE

CHAPTER I

APPELLATE JURISDICTION AND TRIBUNALS

§ 1. Introductory. It is proposed in this treatise to state only fundamental principles governing the jurisdiction and procedure in cases transferred either by appeal or writ of error from an inferior court of record to a superior appellate court.

As such jurisdiction and procedure are now defined and controlled by varying constitutional and statutory provisions in the different States, it is manifest that only general principles can be stated and that even these principles must be merely prevailing principles and subject to frequent exception in many States. Such exceptions cannot be listed or even indicated within the necessary limits of this brief treatise, hence it will be advisable and necessary for anyone who desires to pursue an appellate remedy in any given State to make careful examination of the statutes and decisions of such State before doing so.

§ 2. General Nature of Appellate Jurisdiction. Appellate jurisdiction may be defined as that power which one court has to examine, reverse, modify, or affirm the judgments of a court of inferior jurisdiction. It is thus defined by Judge Story:

“The essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted and does not create that cause. In reference to judicial tribunals, an appellate jurisdiction necessarily implies that the subject matter has already been instituted

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in and acted on by some other court, whose judgment or proceedings are to be revised. This appellate jurisdiction may be exercised in a variety of forms and indeed in any form which the legislature may choose to prescribe, but still the substance must exist before the form can be applied to it."¹

§ 3. Norman Idea of Courts. The Norman idea was that the King himself was the source of all justice and that this royal justice was to be dispensed among his subjects either by the King himself or by his judges and inferior magistrates, all of whom were his personal representatives. In the earliest times the King himself sat and heard causes in his own court, called the "*Aula regis*", but as litigation increased and became burdensome, the business of the *Aula regis* was divided; the crown cases and gradually many civil cases going to the King's Bench; civil actions between subject and subject going to the Common Pleas; and all actions relating to the King's revenue going to the Exchequer. Judges were appointed for all of these courts and as time progressed each extended its jurisdiction, but the King's Bench retained exclusive jurisdiction of crown cases and also retained its character as the King's Court, and hence was the common-law court of the highest dignity and power in the kingdom.

By reason of its supreme character, there was vested in it power, not only to review and revise the decisions of all the inferior common-law courts, but also another power, called the power of superintending control, by which all such inferior courts were either restrained from exceeding their jurisdictional limit, if they essayed to overstep it, or were compelled to act within their jurisdiction, if they refused to act. Both powers were supreme, subject to appeal to the House of Lords, and were exercised by the use of writs which will be referred to later on.

The Court of Chancery was a later development of English jurisprudence and by statute in that country an appeal was provided from that Court to the House of Lords.

¹ 2 Story on Const. § 1761.

§ 4. American Idea of Courts. With us the judicial power, like the legislative and the executive power, is deemed to be vested in the people. The term "judicial power" means the same thing here, however, as in England, namely, the power to hear and decide controversies between citizens and between the State and the citizen. The fundamental nature of judicial power cannot be changed, and in a civilized state that power must be vested somewhere or anarchy results. When, therefore, the people of a State adopt a constitution and vest the judicial power in certain courts, such courts become vested not only with the power to hear and decide controversies, but with all the inherent powers necessary to perform their duties and make their judgments effective, and no legislative act can take away such powers. Nor can the legislature impose other than judicial duties upon constitutional courts, unless the constitution itself provides for such imposition. If the constitution create a superior or supreme appellate court, the legislature cannot take away its appellate jurisdiction. Matters of pleading, practice, and procedure may be regulated by the legislature, but when any statute under the guise of regulation substantially infringes upon the constitutional grant of power, either original or appellate, or deprives a constitutional court of the inherent powers necessary to enable it to exercise the judicial power which the constitution confides to it, the statute will be void.

§ 5. Function of Appellate Courts. Where by constitutional provision a court is endowed with appellate power alone, the legislature cannot extend this power or endow it with original jurisdiction. In the strict and constitutional sense as applied to courts, appellate power means the power to review, revise, reverse, modify, or affirm judgments or decision of inferior *courts*; it does not mean the power to examine and reverse or affirm the decision of administrative officers or boards, such as common councils of cities, or boards of review, and the like. This latter power is a power with which courts of general original jurisdiction are almost universally endowed, but it is properly an exer-

cise of the original jurisdiction and not an exercise of appellate power.

§ 6. **Inherent Powers.** As before said, the constitutional grant of appellate or original jurisdiction to any court always carries with it all the incidental powers which are necessary and convenient, in order that the jurisdiction granted may be effectively exercised.

Judicial power conferred by the constitution cannot be emasculated by the legislature, and it is emasculated if the court be deprived either of the power to properly transact its business or the power to effectively enforce obedience to its decrees. Among the inherent powers which every court of superior jurisdiction has and must have are: (1) the power to punish as for contempt all acts tending to obstruct the course of justice or prejudice the trial of any action or proceeding pending before it;² (2) the power to order and control the manner of the transaction of business before it, subject only to reasonable regulation by the legislature; and (3) the power to set aside and declare void laws which are unconstitutional. All of these powers are absolutely essential to the independence of courts and to the effective execution of their important duties.

² *Ex parte Robinson*, 19 Wallace, 505.

CHAPTER II

ORIGIN, NATURE, AND GENERAL SCOPE OF APPELLATE REMEDIES

§ 7. **Early Appellate Procedure in England.** From very early times it has been recognized that justice demands that there should be some method of reviewing the judgments of trial courts, in order to correct their errors.

By the early English law this was accomplished in different ways, according to the court in which the original action was tried, viz, (1) by writ of error, *certiorari*, or false judgment, issuing out of the Court of King's Bench, when the judgment had been rendered by the Court of Common Pleas or other inferior court; (2) by appeal to the House of Lords when the judgment had been rendered, either by the Court of Chancery or Admiralty, or by the Ecclesiastical Court.

The writ of error was purely of common-law origin and was not a discretionary writ, but a writ of right. In theory it commenced a new and independent action in the appellate court in which the party defeated below was the plaintiff and the other party the defendant. The Court of King's Bench, which was the King's Court, in which he was supposed to be present in person, being informed that error had been committed in an action which had gone to judgment in an inferior court of record, issued its writ directed to such court, commanding it to send up the record in the action, in order that upon inspection thereof the error, if any, might be corrected and justice done. It did not remove the case for retrial upon the merits, but simply removed for reëxamination the questions of law, and resulted either in affirmance of the judgment or reversal and new trial in the trial court, subject, however, to the right of the defeated party to remove the case by a second writ

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of error into the House of Lords, or the Exchequer Chamber, according to the nature of the action. On the other hand, the appeal in equity, admiralty, and ecclesiastical cases was derived from the civil law. It was simply a step in the original action, and not a new suit; and it removed the original action to the appellate tribunal for retrial and judgment on the merits in that tribunal. The office of the writ of *certiorari* was to review the proceedings of an inferior court, tribunal, or officer exercising judicial powers, whose proceedings were summary and not according to the course of the common law, in order that such inferior judicatories might be kept within their jurisdiction. The writ of false judgment was used to review judgments of county courts, courts baron, and other courts not of record, but has never been used in the United States. As neither of the two last-named writs are included within the scope of this article, nothing further need be said about them.

§ 8. The Writ of Error in the United States. All of the American States, except Louisiana, have adopted, either by express constitutional provision or by decision, the English common law, except so far as the same has been changed by constitutions or statutes, or has been considered inapplicable to the new conditions and surroundings prevailing here. As the common-law remedies form an essential part of the common law itself, the writ of error exists in the American States unless it has been abrogated by constitutional or statutory provisions, and may be used by courts which are given appellate jurisdiction to review judgments at law rendered in inferior courts of record. In some States the right to use the writ of error is expressly protected by the constitution and in such States it can, of course, never be taken away or materially impaired by statute, although its use may be subjected to reasonable regulation and the time in which it may be sued out may be reasonably limited; in States where the writ is not protected by the constitution, it may be abolished by statute, either expressly or by providing a different remedy which by necessary implication indicates the legislative intent

that it shall be exclusive. At common law the writ of error was the sole remedy to review a judgment in an action at law before a court of record; it could only be brought to review a final judgment, civil or criminal, or an award in the nature of a final judgment, and could only deal with and correct substantial errors of law appearing on the record. It could not be used to review intermediate orders not final in their nature, nor to review judgments in equity. The functions of the writ may, however, be varied and enlarged by statute, and this has been done in various jurisdictions, so that judgments in equity may be reviewed and also so that the merits may be reviewed. As a general rule proceedings in justice and probate courts and special statutory proceedings not according to the course of the common law cannot be reviewed by the writ in the absence of special statutory provisions to that effect.

§ 9. The Remedy by Appeal. The remedy by appeal, as before stated, is a remedy originally derived from the Roman or civil law and introduced by statute into the practice of the Chancery, Admiralty, and Ecclesiastical Courts. By it the entire controversy was transferred into the appellate tribunal and the action was tried again without reference to the conclusion reached in the inferior court.

The remedy being purely of statutory origin only exists by virtue of some affirmative provision of constitution or statute, and its functions and scope are defined and limited by the constitutional or statutory provisions creating it. In most jurisdictions the powers given to the appellate tribunal are very broad and make the statutory appeal in equitable actions almost, if not quite, the equivalent of the appeal by the civil law, except that it is generally provided that the findings of the inferior court must be shown to be clearly wrong, in order to justify reversal. In common-law actions triable before juries, the tendency has been in many jurisdictions to broaden the powers of the appellate court, so that judgment may be rendered or directed upon the merits in the appellate court and, fur-

ther, so that errors of law shall not necessitate reversal of the judgment unless the court can affirmatively say that the error has worked substantial prejudice to the defeated party.

§ 10. Nature of the Statutory Remedy by Appeal. An appeal is simply a step in the original action by which the case is taken to the appellate court and retried, and there is no right to it unless the constitution or the statute gives such right. The statute conferring the right is considered remedial and to be liberally construed, but it will not be construed to give the right to appeal from judgments rendered before its passage unless it is in terms retrospective, and even in that event vested rights cannot be affected by it. However, if there be a right of appeal existing at the time the judgment in question is rendered, such judgment will be appealable even though there may have been none when the proceeding or action was commenced; and, *per contra*, the repeal of an appeal statute takes away the jurisdiction of the appellate court not only as to causes which have gone to judgment or are still pending in the trial court, but as to causes which have been appealed, but not decided.

§ 11. Essentials of Appellate Jurisdiction. The statutory requirements as to the manner of taking appeals must be strictly followed, in substance at least. In the absence of constitutional inhibition, statutes limiting the right of appeal to certain defined classes of cases or to cases involving certain specified amounts are valid. Ordinarily there must be a real controversy in order to support an appeal; merely academic questions will not be determined, and if the appellate court is apprised of the fact that the case represents no real contest, or that the rights contended for have ceased for any reason to exist, the action will be dismissed, except in exceptional cases. So consent of parties will not confer jurisdiction on the appellate court where it has by law no jurisdiction over the subject matter, as, for instance, where no appeal is given by law; where no appeal has been perfected; where the amount involved is

less than the statute requires; or where the time limited for an appeal has expired. If the inferior court had no jurisdiction, an appeal gives no jurisdiction to the appellate court, save to dismiss the proceedings. It has been held that where a party has two appellate remedies he cannot pursue both at once, but must elect the one under which he will proceed; on the other hand, the United States Supreme Court holds that in a case where there is reason to doubt whether the writ of error or appeal is the proper appellate remedy, it is permissible to pursue both remedies and the appellate court will decide which is the proper proceeding and consider the case under the rules applicable to that proceeding and dismiss the other proceeding.

§ 12. Minor Rules as to Number of Appeals. Separate appeals must be taken from judgments or orders in separate causes; whether separate orders in the same cause may be reviewed under a single appeal or whether separate appeals must be taken from each order depends on the practice and the statute in the jurisdiction in question; no general rule can be laid down.

The rule is general that the appellee or respondent may take a cross appeal from any part of the judgment by which he feels aggrieved. One party cannot ordinarily take a second appeal from the same judgment while his first appeal is pending nor after his first appeal has been heard and decided on the merits, but he may dismiss his first appeal before judgment in the appellate court and in that event the first appeal will be no bar to the second.

§ 13. Diversity of Appellate Courts and Their Powers. In the great majority of the States the highest court in the State, generally, though not universally, called the Supreme Court, has been given general appellate jurisdiction over inferior courts of record, but in quite a number of States intermediate appellate courts have been instituted with limited jurisdiction and given power to hear and decide appeals from lower courts, in some cases finally and in some cases subject to appeal to the Supreme Court or other court of last resort of the State. The constitutional and

statutory powers given to these courts are so various that no general rules can be formulated defining their functions. The constitution and statutes of each jurisdiction must be carefully examined to determine accurately where the appellate power is lodged and the manner in which it is to be exercised in that particular jurisdiction.

§ 14. Power of Superintending Control. The power of superintending control, which is given by many State constitutions to the court of last resort in conjunction with the appellate power, is that power by which a superior court is authorized to control the course of litigation in inferior trial courts by preventing such courts from taking steps outside of their jurisdiction, and compelling them to act within their jurisdiction and the principal writs by which this is accomplished are *mandamus*, *prohibition*, and *procedendo*.¹ As a general rule this power is only exercised when the exigency is grave and the remedy by appeal is utterly inadequate or lacking altogether. In Michigan and Alabama this power has come to be used when there is no serious exigency, but to review ordinary orders from which the statute gives no direct appeal. Thus, in the States last named the writ of *mandamus* is frequently used to perform the functions of an appeal, but the authorities generally do not sustain so liberal a use of the writ.

§ 15. Scope of the Writ of Error. It should be carefully borne in mind that the common-law writ of error, unaided by statute, can only be used to review a *final* judgment. The theory was that until final judgment was rendered, the trial court presumably would correct any intermediate errors and render any review of such intermediate errors unnecessary, or that if it did not correct them still they might be entirely harmless from the fact that the final judgment might be correct and not complained of by any one. But it is not necessary that the decision to be reviewed be a technical final judgment; if it have the nature and effect of a final judgment and be entered by a competent tribunal it will be sufficient, though called an order or an

¹ State *ex rel* v. Johnson, 103 Wis. 591; S. C. 51 L. R. A. 33 and note.

award. In many jurisdictions the functions of the common-law writ of error have been enlarged so that intermediate orders may be reviewed.

§ 16. Scope of the Appeal. As the appeal is purely statutory, the question whether a given judgment, decree, or order is appealable is always to be settled by consulting the statute.

While as a general rule all final judgments (subject to frequent limitations as to the amount involved) are made appealable by the various State statutes, there are many differences in the statutes defining the kind of orders from which appeals may be directly taken and no general rule can be laid down. It may be said, however, that in order to be appealable the order must be made by the court; orders made by a judge at chambers are not as a general rule appealable; nor does an appeal lie from a verdict or from findings; a judgment is not ordinarily considered complete so as to be appealable until the costs are taxed, if it carries costs.

CHAPTER III

PARTIES

§ 17. Who May Appeal. Generally speaking, an appeal can only be taken by a party to the action or by one who is in privity with a party, such as the heir of a deceased party, where the action involves the title to real estate, or an executor or administrator of a deceased party in other actions. These are called privies in blood and privies in representation, respectively. There are also privies in estate, such as joint tenants of real property and lessor and lessee, who possess the same right. It may be said that in all cases where it is made to appear that persons not parties to the record have by legal succession acquired an interest in the subject of the controversy they will be made parties to the action and allowed to prosecute an appeal if their predecessor in interest would have had that right. Instances of this principle are, assignees of insolvent estates, receivers in judicial proceedings, purchasers at foreclosure sales made under a decree of the court, claimants to a fund in court, and the like. The right of appeal may be enlarged by statute and even given to strangers, but this is not usual. In the absence of such a statute a merely nominal party, whose rights are not affected by the judgment in any way, cannot appeal.

§ 18. Appealable Interest. But the person appealing must, in order to successfully prosecute his appeal, have an appealable interest. It must appear that he is interested in the subject matter of the controversy and that his claimed rights will be substantially infringed upon by the judgment if it be allowed to stand, or, to express the idea in other words, it must appear that he would be substantially benefited by reversal or modification of the judgment.

While this is the general rule, particular statutes may enlarge the right of appeal and extend it to persons not parties or to parties whose interest in the subject matter is only remotely contingent. The statutes generally give the right to appeal to parties "aggrieved" and sometimes to "persons" aggrieved or injured. In the latter case the weight of authority is that all persons materially and injuriously affected by the judgment may appeal whether parties to the action or not, though this is denied by some courts.¹ In these statutes "aggrieved" means aggrieved in a legal sense, that is, the appellant must be one whose rights, or alleged rights, are materially and injuriously affected, not one who simply is disappointed at the result.

§ 19. There Must Be a Real Controversy. Appellate courts will not knowingly consider or decide mere moot cases involving no actual controversy. Ordinarily where judgment is rendered against a party the presumption is that there is an actual controversy, but this may be rebutted by extrinsic evidence. The rule is that no appeal will be entertained unless the appellant has an existing right which the judgment appealed from, if erroneous, has substantially prejudiced.² Thus, if it be shown that the parties since the judgment below have settled their controversy, or in case of a dispute concerning the title to an office, if the term of office has expired so that a judgment will accomplish nothing, the court will dismiss the appeal on these facts being made to appear. In the last-named case, however, it may be that if the question of the liability for costs depends upon a decision of the right, and probably if the question of the right to fees be so dependent, the court would entertain the appeal and decide it, notwithstanding the term of office in dispute had expired.

§ 20. Waiver of Right to Appeal. A party who has fully succeeded in the trial court cannot maintain an appeal, but if he has only partially succeeded, but has not obtained all the relief to which he claims to be entitled, he may

¹ 2 Ency. Pl. & Pr. 169, note 3.

² *Mills v. Green*, 159 U. S. 651, 16 Sup. Ct. Rep. 132.

appeal. So too, it is a general principle that a party who accepts the benefit of a judgment in his favor by receiving the money adjudged to be paid waives his right to appeal therefrom, but to this rule there are exceptions. If the sum paid and received was not in dispute but admitted to be due in any event, there is no waiver, and generally it may be said that unless the receipt of the benefits of a judgment necessarily affirms the validity of the judgment, he is not estopped from appealing. There may be a waiver also by voluntarily dismissing the case or by pursuing another remedy, as by obtaining an order for a new trial in the trial court, or by bringing an action on that part of the judgment in appellant's favor, or by bringing an equitable action to enjoin its collection. A voluntary release will estop the party from appealing from the judgment, unless it can be shown that there was fraud in the securing of it.

§ 21. Payment Not a Waiver. Payment by a defeated party of the judgment against him does not of itself constitute any waiver of the right of appeal. Especially is this true where the payment is necessary in order to protect rights or property from sacrifice, as when execution is about to be issued and levied on property. In brief, it may be said that in any case where the payment is not voluntary, the right to appeal remains unaffected. If, on the other hand, it can be clearly shown that the payment was voluntarily made with the intention of settling the litigation, no appeal will be entertained. The controversy is deemed to have been terminated. If the defeated party make an agreement with his opponent by which a part of the judgment is abated or the time of payment extended in consideration of an agreement not to appeal, the appeal is considered as waived. This also amounts to a voluntary settlement of the controversy and in the absence of fraud it will be enforced.

§ 22. Joint Parties. Under the statutes of some of the States, all parties against whom a joint judgment is rendered must join as appellants in order to make an effective

appeal. In other States, however, any party is allowed to appeal on his own account, even though he has been held liable jointly with others. In the first named jurisdiction, it is generally held that in such cases if any party jointly held refuse to join in the appeal, the appealing party may take proceedings equivalent to the ancient summons and severance in writs of error and then may prosecute his appeal alone: probably all that would now be considered necessary would be the service of a written notice upon the non-consenting parties by the appealing party, notifying them that the appeal has been taken and requiring them to appear.⁸ In some States the statutes provide specifically for such a notice, but it is believed that whether they do or not the practice is permissible. It is imperative that all parties jointly held be before the court, either by joining in the appeal or by notice from the party appealing.

§ 23. Necessary Appellees or Respondents. It is also imperative that all parties in whose favor the judgment was rendered and all parties whose interests will be injuriously affected by reversal thereof be made parties to the appeal, or proceeding in error as appellees or respondents or defendants in error; such parties are considered necessary parties without whose presence the appellate court will dismiss the appeal.

§ 24. Death of Party. The death of a party to the action is followed by different results in different actions, depending on the question whether the action be one that survives or not. If the action survive and either party die after judgment and before the taking of the appeal or suing out of the writ of error, it is required in most jurisdictions that the death be suggested to the court and a motion made to revive the action in the name of the legal representative if the action affect personalty, or heir if the action affect realty. It is generally said that at common law, contract actions survive and tort actions do not survive. While this is generally true it is not an accurate statement. The distinction at common law is between actions which affect

⁸ Hardee v. Wilson, 146 U. S. 179.

property or property rights, whether real or personal, and actions which affect the person alone; the first class survives and the second class does not. As the great majority of the first class are contract actions and the great majority of the second class are tort actions, the inaccurate classification above noted is natural. After the substitution is made, the appeal or writ of error may be taken by or against the substituted party in the same manner as though he were the original party, except that he should be named in his representative capacity. In case of death of a sole appellant or plaintiff in error after the taking of the appeal or suing out of the writ of error, his legal representatives will be substituted on suggestion and permitted to prosecute the suit to judgment; if one of several appellants die pending the appeal, as a general rule the survivors may prosecute the appeal to final judgment without any proceedings by way of revival.

In case of the death of a sole appellee, respondent, or defendant in error, pending the appeal, the action will not abate if the cause of action survives, but will be continued against the decedent's personal representatives, nor will it abate in actions which do not survive if the judgment was in the plaintiff's favor below and the appeal or writ of error is prosecuted by the defendant below; but, in case of a cause of action which does not survive, if the judgment was for a sole defendant below and he dies pending an appeal or writ of error prosecuted by the plaintiff, the action will at once abate; if, however, there be several appellees, respondents, or defendants in error, the appellate proceedings will not abate but may be prosecuted against those remaining.. The procedure by which revival of the action and substitution of parties is accomplished differs greatly in different jurisdictions and is purely statutory. In some jurisdictions it is done by mere oral suggestion and presentation of proof of the appointment of a legal representative; in others by formal petition and motion; and in others by still other proceedings. In case the death occurs before the taking of the appeal or the suing out of

the writ, the proceedings for revival and substitution should be in the trial court; if the death takes place after the appeal, the proceedings should be in the appellate court.

§ 25. Transfer or Devolution. If, after an appeal is taken or a writ of error is sued out, the interest of a party is transferred to another, either by act of the party or by operation of law, the person acquiring such interest will be substituted on a proper showing, and allowed to prosecute or defend in place of the original party; but where a corporation has ceased to exist by the expiration of its charter pending the appeal or writ of error, it has been held that the action will be dismissed on the fact being brought to the attention of the court. The bankruptcy of either plaintiff or defendant after judgment below will have no effect on the appellate proceedings; they may be prosecuted to judgment as though no such event had intervened.

CHAPTER IV

TAKING THE APPEAL

§ 26. Leave to Appeal. There are a few jurisdictions where permission to appeal is required, and where such a requirement exists the order granting leave to appeal must appear in the record, otherwise the appellate court acquires no jurisdiction. The record must affirmatively show that the proper steps have been taken as required by statute to obtain the order granting leave. The petition must be in writing, stating the parties, describing the judgment and the error or errors claimed, and specify the court to which the appeal is desired. If the order granting leave be discretionary, there must be good ground for doubting the correctness of the decision below, and the question involved must be of more than ordinary importance, such as the constitutionality of a statute, or it must involve large interests which are of importance to others besides the litigant himself. So in case the statute requires a certificate of importance, the certificate is essential to jurisdiction and its granting is discretionary with the trial court, and this discretion, like other questions of discretion, cannot be interfered with by the appellate court, except in cases of abuse.

§ 27. Notice of Appeal, or Citation. In the great majority of jurisdictions, however, the appeal is a matter of right, except as it may be limited by the amount involved. Where the appeal is a matter of right, no leave to appeal is necessary and the statute generally provides for the service, by the appellant on his adversary, of a notice or citation. The old chancery practice of taking an appeal in open court at the same term at which the judgment is rendered still prevails in some jurisdictions, and in such

cases no service is necessary, but the notice must be entered upon the clerk's minutes or filed in his office during the term. When the statute requires service of a notice of appeal or the issuance and service of a citation, it is in either case jurisdictional, for the subject of appeals is entirely governed by statute, and all the requirements of the statute must be strictly complied with.

While the statutes vary considerably, the general requirements as to the notice of appeal are quite similar and embrace the following essentials: The notice must be in writing, signed by the appellant or his attorney of record; it must be addressed to the adverse party; it must specify the action giving its title and the names of the parties; it must intelligibly describe the judgment or order from which the appeal is taken and name the court which rendered it, and inform the appellee or respondent of the fact that the appellant appeals from the judgment or order described. The notice will be liberally construed and inconsequential defects or omissions will not vitiate it, if the material facts are set forth with substantial certainty. In some jurisdictions a citation or official citation takes the place of the notice of appeal. It is issued either out of the trial court or the appellate court as the statute may prescribe, but in either event it is considered the process of the appellate court. The requirements of the statute as to the contents and service of the citation should be strictly followed. Whether the statute requires a notice or citation as the initial step in perfecting an appeal, it is absolutely essential to the jurisdiction of the appellate court that service be made upon the adverse party or parties, and this includes all necessary parties to the litigation.

§ 28. Application for Writ of Error. At common law in civil cases, the writ of error was a writ of right and no allowance thereof was necessary. It was issued out of the appellate court upon oral application as a matter of course. Such is now the rule in many, if not most, American jurisdictions. In some jurisdictions, however, a formal petition in error is required which, after suitably describ-

ing the action and the judgment, must show the grounds on which the application is based and particularly point out the errors which it is desired to review. In many jurisdictions the writ of error issues as of course upon mere oral application to the clerk of the appellate court in all criminal cases not capital, while in capital cases it must be allowed on cause shown, by the appellate court or one of the justices thereof. In some jurisdictions, however, no writ of error issues in any criminal case without a judicial order allowing it.

§ 29. Allowance of Writ. Where the writ is issued by the clerk as matter of course on oral application, it is sometimes spoken of as allowed by the clerk, but the term allowance properly applies only to the act of a judicial officer, who is vested with the power of granting or refusing an application for the issuance of a writ. While this power is quite properly termed a discretionary power, the discretion is by no means absolute. Where prejudicial error appears to the allowing officer to have been committed, or where grave doubts arise as to the correctness of material rulings, it is his duty to allow the writ, and, on the other hand, it is equally his duty to disallow it if he has no reason to doubt the legality of the conviction. The allowance may be granted at any time during the period within which the writ may issue, and it should be endorsed upon the writ and must, of course, be made by the officer whom the statute invests with the power. The error upon which the allowance is based must be an error appearing in the record. So it will frequently be necessary to perfect a bill of exceptions before obtaining the writ. Where a writ of error is desired out of the Supreme Court of the United States to review a judgment in a State court in a proper case, the writ must be allowed by the presiding Justice of the Supreme Court of the State, or by one of the Justices of the Federal Supreme Court.

§ 30. Essentials of the Writ and Return. The writ issues only from the office of the clerk of the appellate court, unless a statute provide for its issuance out of the

trial court, but in either case it is the process of the appellate court. It should be directed to the trial court or its presiding judge and is served by lodging it with the clerk of the trial court which rendered the judgment complained of. In effect it consists simply of a recital that it appears that error has intervened in a certain cause, naming it, and requires the trial court to certify the record in the cause to the appellate court at a certain time, called the return day, in order that justice may be done.

The original writ is returned together with the original record in the cause, including the pleadings, bill of exceptions, verdict, findings, and judgment; but in some jurisdictions a certified copy of the record is returned instead of the originals. Upon service of the writ, the appellate court obtains jurisdiction of the case. In most jurisdictions a writ must also be issued notifying the defendant in error to appear on the return day and defend the action. This was called a *scire facias ad audiendum errores* (make it known for hearing complaints of errors) in common-law practice, but is termed in modern statutes a citation or summons in error. It is original process of the appellate court and must be served on the defendant in error, or the writ will be dismissed, unless indeed the defendant in error appear generally in the appellate court, in which case he will waive the issuance of process against him.

§31. When Appeal Must Be Taken. Under modern statutory provisions, the appeal is generally considered to be taken when the notice or citation is served, and a writ of error is deemed to have been brought on the day on which it is filed in the trial court. It is generally held that statutes which limit the time within which an appeal must be taken or a writ of error brought are mandatory and jurisdictional and must be strictly followed; as a result of this doctrine it is also held that no exceptions can be made in the statute, and that unless the appeal be taken within the statutory time there is no jurisdiction, and the appeal must be dismissed as soon as that fact is brought to the attention of the court. So it is held that the time

cannot be extended by consent, or by order of court unless the statute so provides, and that a court cannot by extending the time relieve a party from the effects of accident or mistake. There are decisions, however, which hold that where an appeal is prevented from being taken within time by the misconduct of the appellee or respondent, he will be estopped from moving to have the appeal dismissed.

Code statutes generally require the service of a written notice of the entry of judgment by the successful party upon the defeated party and provide that the time within which an appeal shall be taken shall not begin to run until such service is made. The judgment must be completed by the taxation of costs before notice of entry can be given; and usually the statutes require that the judgment shall not only be rendered, but entered upon the clerk's records before notice of entry can be given, so as to start the time running within which an appeal must be taken.

§ 32. The Appeal Bond. At common law no bond was required of one who prosecuted a writ of error, but modern statutes universally require the execution of a bond for costs on the part of the appellant or plaintiff in error in order to prevent groundless and vexatious appeals; and such statutes make the execution and filing of the bond an essential step in the perfecting of the appeal. By the giving of the required notice of appeal or citation, the appeal is considered to be taken, so as to give the appellate court jurisdiction, but it is not perfected so as to be effective for any purpose until the bond for costs, as required by the statute, is executed and filed. The requirement is mandatory and jurisdictional and neither court can dispense with it. When appeals are taken by the State, or by municipal corporations, or by executors or administrators, the statutes generally exempt them from giving appeal bonds, but such exemptions are not extended beyond the cases particularly specified in the statute. There are frequently provisions authorizing the trial court to dispense with the giving of a bond when the appellant is unable to procure it and the question is of such importance that the decision

of the appellate court is deemed necessary; in such cases the certificate of the trial court or judge, showing the necessary facts, must appear in the record in order to give the appellate court jurisdiction to proceed with the case. The bond must follow the requirements of the statute substantially, if not literally; must be payable to the appellee or appellees, unless otherwise directed by the statute; must be approved by the proper officer; and must be executed, served, and filed within the time and in the manner prescribed by the statute. It has been held, however, that where an appeal bond was filed and served within the required time and was in due form, except that the justification of the sureties was insufficient, the appellant may, on motion, be allowed to supply the defect in the appellate court, even after the time allowed by statute for giving the bond had expired.¹

¹ *Ady v. Barnett*, 142 Wis. 18.

CHAPTER V

SUPERSEDEAS

§ 33. **Original Meaning of the Term.** As originally used at common law, the word "supersedeas" was the name of any writ issued by a court to relieve a party from the operation of another writ which either had been or might be issued against him; it was directed to the officer whose duty it was to enforce the writ whose operation was to be suspended, and commanded him to desist from the execution thereof. Its most frequent use was to stay the issuance of execution after judgment. At common law the writ of error, like the writ of *certiorari* and the writ of *habeas corpus*, operated as a stay of proceedings *ex proprio vigore* (of its own force), and hence stayed the issuance of execution in the trial court from the moment of its allowance. This doctrine, however, was early changed by statute in England, as well as in this country. An appeal in equity also operated to stay proceedings in the early English courts, but the rule now is that a special order must be issued for that purpose or the proceedings in the trial court will not be stayed.

§ 34. **Meaning under Modern Statutes.** The term as now used is practically synonymous with "stay of proceedings". In the great majority of instances no writ or order is issued, but the statutes generally provide that when an appeal is taken or a writ of error sued out the proceedings below shall not be stayed until and unless a bond or undertaking is given with certain prescribed conditions, varying according to the nature of the case. This bond is independent of and in addition to the appeal bond for costs referred to in the previous chapter. The giving of this bond under

such a statute *ipso facto* (by the fact itself) stays further proceedings in the trial court until the determination of the appeal, hence in such cases there is no writ or "supersedeas" in the original meaning of the term, but the word is still used to denote the effect of the giving of the bond or security, and the bond itself is called a supersedeas bond.

§ 35. Statutory Supersedeas Not Exclusive. While the statutes of most jurisdictions attempt by general provisions to prescribe the form of the bonds required to stay proceedings pending the appeal in any given civil case, there are frequently cases for which either intentionally or inadvertently no special bond is provided. In some jurisdictions it has been held that in such cases, where no special bond is required or prescribed by law, the court has the inherent power to grant a stay of proceedings during the pendency of the appeal or writ of error upon the giving of such bond or security as it may deem adequate and proper in form.¹ The motion in such case is directed to the discretion of the court and such discretion will not ordinarily be controlled by mandamus. Generally it must appear in order to justify the granting of the stay that if the judgment be enforced, serious if not irreparable injury will result to the appellant if he be successful on his appeal.

§ 36. What Court May Allow. The power to stay proceedings in the trial court upon appeal or writ of error and to prescribe the conditions by way of bond or undertaking which must be given by the appellant as a condition of the stay is vested in the trial court, as well as in the appellate court, but it is a condition of its exercise by the appellate court that an appeal must already have been taken or a writ of error sued out. In either case the statute generally, if not universally, provides that the power may be exercised by a judge sitting in chambers as well as by the court. In some jurisdictions the appellate court will require that application be first made in the trial court, for the reason that such court is familiar with the facts and better able to judge of the merits of the appeal and decide whether the

¹ *Home Fire Ins. Co. v. Dutcher*, 48 Neb. 755, 67 N. W. 766.

ends of justice call for a stay of proceedings pending the final determination of the matter in the appellate court; but this rule is not universal.

§ 37. When Bond Is Not Required. In some jurisdictions there are exceptions to the rule requiring a bond to be given in order to stay execution. These exceptions generally include an executor, administrator, receiver, or trustee who appeals in his official capacity. Sometimes also municipal corporations appealing are exempted from the giving of the bond. A deposit of money in lieu of a bond is frequently authorized and this deposit when made does away with the necessity of a bond.

§ 38. Form of the Bond. Where the statute prescribes the exact form of the conditions of a supersedeas bond to be executed in a given case, that form must, of course, be followed, and where the court fixes the amount and conditions of the bond (as it may lawfully do where the statute is silent), the order of the court must be followed. However, if the bond substantially follows the requirements of the statute or order of the court, it will be deemed sufficient, although the letter be not followed. Too much care cannot be taken to follow the requirements of the statute as to all the details, such as the number and justification of sureties, the approval of the bond by the proper officer, the service and filing thereof; failure in these particulars may result in difficulty, if not in disaster.

§ 39. Modification or Vacation. An order granting a stay of proceedings which has been made under the general power of the court to preserve the *status quo* pending an appeal, and is not the result of the giving of a bond under express statutory provisions, may be vacated or modified upon a showing that it was improvidently issued or was obtained by fraud. In case of a statutory stay resulting from the giving of a bond, such stay may be vacated if it appear that the bond given is insufficient or does not comply with the statute, or that the sureties have become bankrupt. If the appeal has been already taken, the application should be made to the appellate court, which court

may permit new or additional security to be filed in its discretion.

§ 40. Effect of Supersedeas. In the absence of statutory provision enlarging its function, a supersedeas does not affect in any way anything which has already been done in the trial court. It simply preserves the existing condition of things pending the determination of the appeal. Nor does a supersedeas confer a right on the appellant to do an act which the judgment appealed from prohibits him from doing, for this would make it perform the function of a judgment of reversal before the case was even heard by the appellate court. If execution has not been issued, a supersedeas prevents its issuance during its continuance; if execution has already been issued and a levy made but not completed by sale of the property, the ancient rule was that the execution was not stayed because the levy and sale were indivisible and the execution was in legal effect fully executed at the time of the levy; the modern rule, however, generally is that a supersedeas suspends the proceedings and discharges any levy which has not been perfected by sale of the property. It is held, however, that a supersedeas does not affect the lien of the judgment given by the statute upon real estate, as may be seen from an examination of various statutes and decisions.

§ 41. Effect on Self-Executing Judgments. There are some judgments which are self-executing, that is, do not require the issuance of any process or writ for their enforcement. Among these are judgments of ouster from office in *quo warranto* proceedings, or suspension of an attorney from practice in disbarment proceedings. In case of such a judgment a supersedeas bond has no effect except to stay the issuance of an execution for costs. The evident reason is that the supersedeas bond has no effect save to preserve the *status quo* existing at the time it is filed; it vacates nothing which has been already accomplished and as the removal has already taken place the bond is of no effect. As Chancellor Kent expressed it in *Graves v. Maguire*:²

² *Graves v. Maguire*, 6 Paige Ch. 379.

“The effect of an appeal after the proper steps have been taken to render it a stay of proceedings upon the order or decree appealed from is to leave the proceedings in the situation they were at the time of perfecting such appeal, but not as they were before the order or decree appealed from was entered.”

§ 42. Supersedeas in Criminal Cases. In some jurisdictions the writ of error itself operates to stay proceedings in criminal cases, but generally the statutes provide that in order to operate as a stay the writ must be allowed by a judge of the appellate court with an order for stay of execution. In some jurisdictions there must be a certificate of reasonable doubt either by the trial judge or by one of the judges of the appellate court before a stay can be ordered. Even where there is no statute to this effect a stay will not ordinarily be granted unless it is made to appear that there is a reasonable doubt whether error has been committed. A stay of execution in a criminal case does nothing but suspend the execution of the sentence pending the review of the case; it does not discharge the prisoner from custody or admit him to bail; if the prisoner be in custody he will remain in custody, notwithstanding the stay. Statutes generally provide that the judge granting the stay may also fix the bail to be given by the prisoner pending the review, but the two matters are independent of each other.

CHAPTER VI

BILL OF EXCEPTIONS, CASE MADE, AND CASE CERTIFIED

§ 43. **Origin and Purpose of Bill of Exceptions.** The bill of exceptions was unknown to the early common law and had its origin in a statute, 13 Edw. I., ch. 31. The reason of its creation is thus quaintly expressed in Bacon's Abridgment, Vol. 1, p. 778:

"At common law a writ of error lay for an error in law, apparent in the record, or for an error of fact where either party died before judgment; yet it lay not for an error in law not appearing in the record; and, therefore, where the plaintiff or demandant, tenant or defendant, alleged anything *ore tenus* which was overruled by the judge this could not be assigned, for error not appearing within the record, nor being an error in fact, but in law; and so the party grieved was without remedy."

To express it more intelligibly to modern ears, the reason is this: The proceedings upon the trial are no part of what is technically called the "record" of a cause. The record as understood at common law was composed of the pleadings, verdict or finding, and judgment; by statute in many jurisdictions such intermediate orders as involve the merits and necessarily affect the judgment are in effect made a part of the record, but the examination of witnesses on the trial, the rulings on evidence and the other proceedings occurring on the trial were and are not considered as any part of the formal record. Hence, as a writ of error, only reviewed errors appearing on the face of the record and the errors made by the judge in ruling on evidence at the trial or in charging the jury were unassailable upon a writ of error. For this reason the statute was passed which

required the judge to put his seal to a statement or bill showing the rulings and exceptions on the trial, which being done the bill became a part of the record and the rulings shown to be excepted to became properly subject of attack and consideration in the appellate court.

§ 44. Form and Contents of the Bill. The bill should have a caption and introduction showing that it is a bill of exceptions, and in what cause it is settled; it should contain the evidence given on the trial or such parts of it as are necessary to show the questions of law raised by the exceptions; documents introduced in evidence should be incorporated in the body of the bill or a copy attached as an exhibit and thus made a part of the bill; in some jurisdictions documents which are on file may be made part of the bill by reference, without incorporating them at length, but it is better to insert every document in the bill and thus avoid all possibility of mistake; if there have been motions founded on affidavits made during the trial they must be incorporated, together with the exception to the ruling, if the ruling be questioned; the instructions complained of must be inserted with the exception, and instructions which were refused as well; the exceptions must be shown to have been taken in due time and the grounds of objection must be set forth, and questions of fact cannot be reviewed unless the bill be certified by the trial judge to contain all the evidence introduced on the trial.

§ 45. Settlement of the Bill. Anciently the bill was required to be settled before the jury was discharged, but modern statutes universally provide for settlement of the bill after the trial. When a time is fixed within which it is to be settled, it must be settled within the prescribed time or such added time as the court may allow, or it will not be considered. The bill is drawn by the defeated party and presented to or served upon the opposing party with a notice of the time and place when and where it will be presented to the trial judge for settlement, and the opposing party may make and propose amendments at any time before settlement. When settled it is signed by the trial

judge with a certificate as to its contents. Mandamus will lie to compel a trial judge to settle a bill of exceptions if he refuse, but the trial judge will not be required to settle it in any particular manner. Nearly all the matters referred to in this section are governed by statute or rule in each jurisdiction and there are many differences in practice. The statute or rule should be closely followed.

§ 46. Purpose of Case Made. In some jurisdictions provision is made by statute for the review of questions of law by means of what is called a "case made", or "settled". This may be defined in general terms as a written statement of so much of the proceedings below as is necessary to show the error complained of duly authenticated by the trial judge. It is in a sense a substitute for a bill of exceptions, but quite different in its character. The bill of exceptions contains only the proceedings upon the trial or hearing in order that they may become an integral part of the record. It should not contain the pleadings, intermediate orders involving the merits and affecting the judgment but not made on the trial, nor the judgment, for these are part of the record already and the only function of the bill is to make those proceedings a part of the record which are not so unless brought in by the bill. On the other hand, the "case made" must be complete in itself. It must contain a full statement of all matters whether of record or not, which are essential to present the error of law or fact complained of.

§ 47. Contents of Case Made. The case made must state every question raised by the appellant and must include copies of all pleadings, orders, and rulings which are questioned on the appeal, as well as a copy of the judgment, or at least it must contain a sufficient statement of their substance which will accurately inform the appellate court of the significance of the alleged errors. Of course, the objections to evidence and the rulings thereon, as well as the exceptions, must be included if the error be an error in the admission of evidence. In like manner the instructions given or refused with the exceptions to the rulings must

appear, as well as all evidence essential to establish the relevancy of the instructions rejected or the inapplicability of the instructions given to which exception has been taken. In fine, the case made must be a complete presentation of all matters necessary to be before the appellate court to judge of the correctness of the ruling or rulings attacked on the appeal. The requirements as to the service of the case, the proposal of amendments, the time within which it must be settled, the presentation thereof to the trial judge for signature, and other matters of practice follow quite closely the requirements governing the settlement of a bill of exceptions, but as they are practically all statutory and vary in different jurisdictions no attempt will be made to state them here.

§ 48. Case Certified. In various jurisdictions there are statutes providing that when a question arises in criminal actions so difficult or important as to require the decision of the appellate court thereon, the trial judge may certify such question or questions to the appellate court for answer. This certification is to be made after conviction and before judgment. The cause itself is not transmitted to the Supreme Court as on writ of error or appeal, but the proceedings are stayed in the trial court until the certified questions are answered. The questions so allowed to be certified are questions of law only. This certificate is only made upon the request or with the consent of the convicted party, and only the questions certified by the trial court will be considered. There are also provisions in the Federal statutes allowing certification of questions arising in the circuit courts of the United States to the Supreme Court of the United States in case of a division of opinion between two judges who are holding that court, and there are also provisions authorizing the circuit court of appeals to certify to the Supreme Court any question of law in respect to which it desires instructions.

The various proceedings noted in this section by which specific legal questions are certified to supreme or appellate courts are simply proceedings by which the lower court is

enabled to take the advice of the superior court in the course of an action on some delicate or doubtful proposition. Such proceedings have really no connection with appeals or writs of error, for no appeal is taken or writ of error sued out. They accomplish, however, the same purpose with regard to the specific question certified and they are noticed here for that reason.

CHAPTER VII

ASSIGNMENT OF ERRORS

§ 49. General Form. In some jurisdictions a separate document called an assignment of errors must be filed within the time required by law, in order that the appellant may have any standing in the appellate court. This paper is in legal effect the appellant's complaint in the appellate court. It does not in any true sense raise questions of fact, but simply questions of law. It is true that it sometimes raises the question whether the verdict or the finding is sustained by the evidence, and in this sense raises a question of fact, but that question after all is simply the question whether the court or jury came to the right conclusion on the evidence presented, and that is largely a question of law. Its purpose is to specify in apt and definite words each ruling of the trial court which the appellant proposes to challenge upon the appeal. It must cover all the rulings complained of for, except in rare instances, the appellate court will not consider errors not specifically set forth in the assignment except the want of jurisdiction of the subject-matter, which, as we have seen, is always open. It must state the names of all of the parties to the appeal.

§ 50. Must Be Specific. An omnibus assignment of error, like an omnibus exception to the charge or refusals to charge of the trial court, will be of no avail. It will not do to allege that the court erred in charging the jury, or that the charge was misleading, nor is it of any avail to assign as error that there were errors of law occurring on the trial or misdirection in the charge. These, and like objections, are too general to receive notice. The particular ruling or decision attacked must be separately specified and definitely alleged to be erroneous. Each assign-

ment of error must state one complete point upon which review is desired, and no more. The court will ordinarily allow amendment of an assignment of errors upon timely motion, if the proper objection and exception were preserved below.

§ 51. By Whom Assigned. Here the same rule applies as applies in determining who may appeal. Only a party to the action or a privy can assign error, and then only when his rights or interests have been injuriously affected by the judgment from which the appeal is taken. Parties who have intervened in an action after its commencement may assign error if their interests have been injuriously affected by the judgment. A party cannot assign error upon a favorable ruling, nor can he allege that an erroneous ruling which was made at his own instance is erroneous; plain principles of estoppel operate here. However, it is to be remembered that a party who only recovers a part of his claim may appeal therefrom and assign error because his recovery was too small. Parties jointly interested should assign errors jointly; and conversely, parties separately interested should assign errors separately; the rule is that a joint assignment of error must be good as to all who join in it or it will not avail anyone.

§ 52. Plea. The usual plea of the appellee or respondent is called the common plea, or rejoinder in error. In effect this is an allegation that there is no error in the record and a demand that the judgment be affirmed. There may also be special pleas containing allegations of matters in confession and avoidance, such as a release of errors or the fact that the writ of error is barred by the statute of limitations. A joinder in error is held to waive technical objections, such as objections to the form of the notice of appeal, or the want of notice thereof, or the failure to file the transcript within the proper time, and the like. In some jurisdictions cross errors may be assigned by the appellee or defendant in error without his having taken an appeal or sued out a writ of error, on the ground that one appeal presents the whole controversy, but in other

jurisdictions, cross errors cannot be assigned by the appellee unless he has taken a cross appeal.

§ 53. Not Required in Some Jurisdictions. In many jurisdictions there are no pleadings in the appellate court by either party and hence no separate assignment of errors. In such jurisdictions it is generally required that the appellant or plaintiff in error shall assign his errors specifically and definitely at the beginning of his brief, and he is limited to the errors there assigned in the same manner as in case of a formal separate assignment of error in the jurisdictions which require such formal and separate assignment.

CHAPTER VIII

HEARING IN THE APPELLATE COURT

§ 54. Abstract of the Record. The appeal having been perfected and the record or a transcript thereof having been transmitted to the appellate court, careful attention must be paid to the statutes and court rules governing the presentation of the case in that court. These are by no means uniform in the various jurisdictions, but there are some general propositions which, while differing in details, may be said to prevail in the great majority of the appellate courts.

Because the record itself is ordinarily quite voluminous and contains many things entirely immaterial to the questions raised by the appeal, many appellate courts require an abridgment or abstract of the record to be printed and furnished to the judges upon the argument. In most appellate courts this is a positive necessity, for if the judges were forced to search the original record to ascertain the status of the case below, many appellate courts would be unable to transact the volume of business which annually comes to them. The duty of making this abstract falls upon the appellant or plaintiff in error, and the rules usually require that it be indexed. It is generally denominated an "abstract of the record", but other names are applied in various jurisdictions, such as "printed case" or "paper book".

§ 55. Must Be an Abridgment Only. By whatever name it be called there is one general rule applicable to the abstract in all jurisdictions. Its purpose being to place before the court in convenient form the means of readily ascertaining every material fact which the record shows bearing on the questions raised by the appeal, the rule is universal that it should contain only so much of the record

as bears upon the points raised on the appeal and that even this should not be stated at length, or in detail, but in an abridged form. The utmost brevity which is consistent with an intelligible presentation of those parts of the record legitimately bearing upon the controversy in the appellate court is the *desideratum*. As the idea is expressed in the rules of the Supreme Court of one State, it should "preserve everything material to the question to be decided and omit everything else." If the attorneys on both sides and the court could always agree on what facts legitimately bear on the questions raised by the appeal, there would be little difficulty in preparing a perfect abstract, but unfortunately this is frequently not the case.

§ 56. Form and Contents. The ideal abstract should set out the necessary facts chronologically and, unless otherwise provided by rule, it should commence with a statement of so much of the pleadings as is material to the questions raised; if intermediate orders are to be reviewed, they should be printed with the material portions of the affidavits and other papers used at the hearing; if a bill of exceptions has been settled, the abstract should contain a condensed résumé thereof; it should not be set forth by question and answer except where an objection and exception has been preserved and the correctness of the ruling is to be attacked upon the appeal; it should show all the exceptions taken which are relied upon for reversal; the instructions to the jury to which exception was taken should also be incorporated, as well as the instructions requested and refused and the exception in each case; it should also contain all the motions made in course of the trial or after verdict, that is, motions for nonsuit, for direction of a verdict, to set aside the verdict, and for new trial, for judgment *non obstante veredicto* (notwithstanding the verdict), and the like, together with the rulings thereon and the exceptions to the rulings; it should set forth such parts of the exhibits, if any, which are material, and should state the substance of the judgment rendered and the facts as to the taking of the appeal.

§ 57. **Insufficient Abstract.** It is quite generally provided that where a respondent or appellee deems the appellant's abstract insufficient or defective, he may print and serve a supplemental or counter abstract containing such additional matters from the record as to him seem necessary to make a complete abstract. It has been held in some jurisdictions that where no supplemental or counter abstract is filed, the appellant's abstract will be taken as correct, but this rule does not obtain in all jurisdictions. An unnecessary additional abstract will be stricken out by the court on motion. If an abstract be found by appellant to be defective, the court will on motion allow an amended abstract to be filed, but if the time within which an abstract may properly be filed has not expired, it has been held that the amended abstract may be filed as a matter of course.

§ 58. **Briefs.** A brief is a printed argument furnished to the court and to opposing counsel containing the propositions of law or of fact advanced by the party furnishing the brief to maintain his contention, together with such arguments and citations of authorities as he deems material and advisable. It should be entitled in the case, should be subscribed by the counsel making it, and should, of course, conform in all respects both as to form and as to time and manner of service to the statutes and rules governing the particular appellate court to which it is submitted. The requirement that briefs be furnished is universal in all appellate courts, and it is made primarily for the benefit of the court itself and hence cannot be waived by agreement of the parties.

Appellant's Brief. The appellant's brief must be first made and served. Rules of practice generally provide that it shall open with a concise statement of the nature of the action, the issues involved, and the result in the trial court; but even if the rules do not so provide there is no other logical or proper way in which the appellant's argument can open. In a few general and comprehensive sentences, the court should be advised of the character of the questions to which its attention is to be directed.

A statement of the errors relied on should follow the statement of the case in the appellant's brief. In some jurisdictions the appellant is required to file an assignment of errors as an independent document as has been pointed out in a previous chapter, but whether this be so or not the rule is quite general that the appellant's brief must contain a statement or assignment of the errors relied upon and that no error not thus assigned will be considered. To this, however, there is one exception, namely, the objection of want of jurisdiction of the subject matter, which, of course, is never waived and will be raised by the court of its own motion, if necessary. Nor as a general rule will a mere statement that the court erred in making a certain ruling be considered as sufficient to require the court to examine the question. The brief should state the appellant's reason for the faith which is in him. Points not raised in the trial court will not ordinarily be considered in the appellate court, except objections to jurisdiction of the court below or the subject matter, and the objection that the complaint does not state a cause of action.

In General. The respondent's or appellee's brief is an answer to the appellant's brief and should take up the appellant's arguments *seriatim* and answer them, citing such authorities as are deemed applicable. There need be no statement of the case unless indeed the appellant's statement be so erroneous or deficient as to make a restatement necessary. If in any brief it be necessary to refer to specific evidence or rulings, or to make an argument based on the testimony of witnesses, appropriate reference to the pages of the record and the abstract where the evidence or ruling in question is to be found should always be made, and this is generally required by rule. No brief should contain language abusive or disrespectful to either the trial court or the appellate court, or to opposing counsel. Briefs which offend in this respect may be stricken from the files, and if the offense be gross, counsel who present the brief may be punished for contempt. Rules frequently provide penalties for the failure to serve or file briefs within the

required time, such as the affirmance of the judgment or dismissal of the appeal in case of appellant's default, or the reversal of the judgment in case of appellee's default, but the courts are not inclined to deprive parties of valuable rights on the ground of mere delay, and if some plausible excuse be shown the default will generally be condoned by the infliction of costs.

§ 59. Oral Arguments. It is believed that all appellate courts allow oral arguments of cases in addition to the printed briefs, but some courts welcome and encourage such arguments while others apparently discourage them. In the opinion of the writer oral arguments are valuable to the court and assist very materially in obtaining an early and intelligent grasp of the case and the real vital questions upon which the decision must depend. This opinion is a deliberate judgment based upon twenty years' experience upon an appellate bench. While both brief and oral argument are designed to accomplish the same purpose, namely, to convince the court of the justice of the cause of one or the other of the parties, they really are essentially quite different in their scope. In the hands of an able lawyer the oral argument may well accomplish one useful purpose and the brief another. The oral argument in this day and generation should not be either an oration, a jury speech, nor a prosy reading of authorities: in fact, most courts will allow neither of these things.

The prime functions of the oral argument are: (1) to place before the court in the simplest and most convincing way the fundamental facts upon which the party bases his right; and (2) to state the legal propositions which the party deems applicable to these facts. Elaboration of legal propositions or fine spun analytical reasoning have no proper place in the oral argument; these may be well left to the brief; but if the lawyer by a brief and luminous statement of his case and his legal propositions has endowed the judges with a clear understanding of his position, he has done much to win his case if it be worth winning. He may then quite safely leave it to the mercy

of the judges, who will proceed with much less difficulty to an intelligent examination of the more finished argument contained in his brief.

§ 60. Rehearing. Every appellate court has power to grant a rehearing of a case which has been decided so long as it still retains jurisdiction of the case. Generally speaking, jurisdiction remains with the appellate court until the case has been remitted to the trial court, pursuant to the judgment. The manner of proceeding in order to obtain a rehearing is prescribed by statute or rule which must be closely followed. It is generally required that a motion or petition be made, supported by a printed brief, within a certain limited time after the decision is made, to which brief the opposing party may make reply within a given period. Generally, oral argument is not allowed on such motions, but they are considered and decided upon the briefs alone. The motion for rehearing in order to be successful must disclose some weighty reason, such as the failure to consider a vital point or a decisive authority, or a manifest and material error of fact or law in the opinion already filed. A mere change in the *personnel* of the court is not in itself any cause for a rehearing of the case.

CHAPTER IX

SCOPE OF REVIEW

§ 61. General Rule. Subject to some exceptions, noted in the following section, an appellate court will not consider questions which were not raised in some appropriate manner in the trial court. The all-sufficient reason for this rule is that good faith requires that the opposing party and the trial court should have timely notice of the defect or error which is claimed to exist in order that it may be obviated or corrected in that court. If a point need not be raised until the appellate court be reached, it would be frequently possible for a cunning lawyer to skillfully lay traps in the way of the most meritorious cause of action, which would defeat justice and turn the courts into veritable instruments of injustice. The rule applies to suits in chancery as well as to actions at law. The objection should be made at the first seasonable opportunity, and must be made by the party entitled to interpose it. If several join in an objection it will not be available to anyone unless all are entitled to make it; on the other hand, if one make an objection which a number are entitled to make, those not objecting cannot take advantage of the objection.

§ 62. Objections Never Waived. Some objections, however, are never waived, namely, those based upon some fundamental defect or omission which destroys all right to a judgment under any circumstances. Chief among these defects are (1) lack of jurisdiction of the subject-matter in the trial court; and (2) failure to state any cause of action in the complaint. The reasons are obvious. If, for instance, a trial court which has no jurisdiction over actions of divorce should attempt to entertain a divorce action and render a judgment, it would be perfectly plain to any mind

that such a judgment would be absolutely void at all times, because the consent of the parties could never give the court power which the statute withheld from it. Again, if a complaint states no cause of action under any circumstances, no judgment should be allowed to stand. For somewhat similar reasons it is held that where a question of public policy is involved, the appellate court will consider it though never raised below, and if on the record it appears that by the judgment appealed from the settled policy of the state is defeated or violated the judgment will be reversed.¹ A want of necessary parties may also be taken advantage of for the first time in the appellate court, but the missing parties must be parties whose presence is absolutely necessary to the rendition of an effective judgment—not those who are merely proper parties. The objection that persons who are merely proper parties have not been joined, is waived if not taken in the proper manner in the trial court.

§ 63. Objections Waived. Subject to the foregoing exceptions practically all objections must be made in the trial court or they will be deemed waived in the appellate court. It would be impossible to enumerate the objections which may be thus waived, but some illustrative examples will be given. The objection that the action is barred by the statute of limitations; that there has been a former adjudication of the cause of action; that the plaintiff is guilty of laches; that the trial court did not obtain jurisdiction of the parties; that there is an adequate remedy at law; that there was error or irregularity in empanelling the jury; that there is a misjoinder of parties, or incapacity to sue; that the complaint is indefinite or uncertain; that a defense which was fully tried was not pleaded, and generally it may be said that if a defendant fails to plead a defense which he possesses and proceeds to trial and judgment, he cannot be heard to raise the omitted defense for the first time in the appellate court.

¹ *M. N. Bank v. Shinn*, 163 N. Y. 360; *Oscanyan v. W. R. A. Co.*, 103 U. S. 261.

§ 64. Objections to Pleadings, How Taken. As a general rule all objections to the form or sufficiency of pleadings (always excepting the objection that there is no jurisdiction of subject matter and the objection that no cause of action is stated) must be taken by demurrer or by preliminary motion or they will be deemed waived, both in the trial court and in the appellate court.

In the code States generally, the following objections to the complaint must be raised by demurrer where the facts appear on the face of the complaint, viz, that the court has no jurisdiction of defendant's person; that the plaintiff has no legal capacity to sue; that there is another action pending for the same cause between the same parties; that there is a defect of parties, plaintiff, or defendant; that several causes of action have been improperly united, and that the cause of action is barred by the statute of limitations. If the defect does not appear on the face of the complaint, it must be taken by answer or it will be waived. The same rules govern objections to counterclaims so far as applicable. Other objections to the pleadings in the code States, such as that they are frivolous or sham, contain irrelevant, redundant, or scandalous matter, or are too indefinite or uncertain to be understood, are reached by preliminary motion. But however these various formal objections are reached under the procedure of any particular State, if the objection be not raised in the trial court, it will not be noticed in the appellate tribunal.

§ 65. Intermediate Orders, When Reviewed. Orders made during the progress of the litigation before trial which affect mere questions of practice are rarely reviewable in the appellate court, either on direct appeal from the order itself, or on appeal from the judgment. As before stated, the question of appealability always depends upon the statute and no appeal exists unless definitely given by statute.

An intermediate order which involves the merits of the litigation and necessarily affects the judgment is frequently made appealable by direct appeal from the order itself, as

well as reviewable upon an appeal from the final judgment. Examples of the latter class of orders are: orders overruling or sustaining a demurrer; orders granting a new trial; orders granting, refusing, modifying or vacating an injunction, writ of attachment, or other provisional remedy; and orders which in effect determine the action and prevent the entry of a judgment. By some statutes intermediate orders which are not themselves directly appealable are made reviewable upon appeal from the final judgment. Care should be taken not to confuse the nature of the two remedies. If the order itself be made appealable, the appeal is taken directly from the order and generally must be taken and perfected within a brief time after its entry; if, however, it be made reviewable upon appeal from the final judgment, no special steps need be taken at the time of the entry of the order, except in some jurisdictions by the filing of a written exception to the order; this last step, however, is dispensed with in other jurisdictions and all intermediate orders involving the merits and necessarily affecting the judgment which appear upon the record may be reviewed upon appeal from the final judgment, although no exception thereto be preserved.

§ 66. Rulings on Evidence. Rulings on evidence made on the trial of the cause or proceeding, or on the hearing of a motion, are not intermediate orders within the meaning of the last section and no appeal lies directly from such rulings.

In order that rulings upon the admission of evidence by the trial court may be reviewed upon appeal from the judgment, there must be suitable objection made to the evidence, either by timely objection to the question where the form of the question is objectionable, or by motion to strike out the evidence where it is volunteered by the witness without question, or in answer to a proper question. The objection must state the grounds on which it is based and, as a general rule, only such grounds will be considered on appeal. There must then be a ruling of the court on the objection or motion, and an exception to the ruling. Without an

exception the benefit of the objection is lost, but the exception is not required to state the grounds; in practice it simply consists of a statement by the attorney that he excepts, but in legal effect it is a notice that the party deems the ruling erroneous and intends to challenge the correctness of the ruling, either upon motion for new trial in the trial court or upon appeal in the appellate court. Finally, there must be a bill of exceptions settled by the trial judge, incorporating the objection, the ruling, and the exception, in order that it may become a part of the record, and reviewable upon appeal from the judgment. The nature of the bill of exceptions has been fully explained in a preceding chapter.

§ 67. Other Trial Rulings. In like manner it may be said with substantial accuracy that none of the rulings made upon the trial of an action or proceeding become a part of the record so as to be noticed or considered upon appeal from the judgment, unless they are duly excepted to and incorporated in the bill of exceptions. The exception to a ruling excluding or admitting evidence is made orally at the moment of the ruling and taken down by the stenographer, but the exception to instructions given to the jury or to refusals to give requested instructions are generally required to be in writing and filed; unless the statute otherwise provides, such exceptions should be filed before the jury retires in order to give the trial judge opportunity to correct his error, if one has been made. The exceptions must be specific, and each must be confined to a single legal proposition. A general exception to a whole charge, or to a number of separate propositions, or to the refusal to give a number of separate instructions will not avail if the ruling be correct as to any one of the propositions. So with regard to other trial rulings, an exception incorporated in a bill of exceptions is always necessary to preserve the point; for example, if objection be made to the jury, or to the competency of any one juror on the *voir dire*, there must be an exception to the adverse ruling. If a nonsuit be granted or denied, if a verdict be directed or a motion

to direct a verdict be denied, and, in general, if any motion or application made upon the trial be granted or denied and the opposing party desires to review the correctness of the ruling upon appeal, due exception must be made at the time. Again, if it be desired to review the sufficiency of the evidence to sustain the facts found, there must be some ruling in the bill of exceptions which is duly excepted to and which raises this question, like a motion for nonsuit, a motion to direct a verdict, or a motion for a new trial on the ground of lack of evidence to sustain the verdict.

§ 68. Exceptions to Findings. As a general rule findings of fact or of law made by the trial court in actions not tried before a jury must be excepted to by written exception, and the exception must be preserved in the bill of exceptions in order to be reviewed on appeal. The rule that each exception must be specific and confined to one proposition applies to such exceptions. An omnibus exception to all the findings or to several distinct findings will not be considered. In case of trial before a referee it is generally provided that exceptions must be filed to the referee's findings in order to bring them before the trial court for review. If the report and findings of the referee be confirmed by the court, exception should be filed to the order of confirmation, and all the exceptions should be incorporated in the bill of exceptions in the same manner as if the case had been tried by the court itself.

Exceptions to rulings on evidence in actions tried by the court or a referee are taken and preserved in the same manner as in trials before a jury; in case the rulings were made by the referee the exceptions should be renewed in the trial court upon motion to confirm or modify or set aside the report.

§ 69. Court Confined to Record. It is an unvarying rule that in the review of cases by an appellate court, either on appeal or writ of error, the court is confined to the record itself and can consider no matter outside thereof; were it to consider new evidence or allow additional facts to be brought in or objections to be made, the court would

be virtually exercising original instead of appellate jurisdiction. This rule demonstrates the necessity of the making and settlement of a bill of exceptions if the error complained of be one committed on the trial of the case, inasmuch as the proceedings on the trial of a case are not part of the record unless preserved and incorporated in a bill of exceptions. It should be remembered also that an appeal from a judgment does not bring up for review any orders made after judgment, and, *per contra*, an appeal from an order made after judgment does not bring up for review the judgment itself. It has been before noted that in many jurisdictions an appeal from the judgment brings up for review all orders made in the cause "involving the merits and necessarily affecting the judgment" whether they be excepted to or not, but this is a matter governed by the statutes of the various States.

§ 70. Presumptions as to Record. The general presumption is that the trial court complied with the law as to every act necessary to sustain the validity of the judgment, and the appellant must accordingly, show error affirmatively by the record, or he will fail; so where it is desired to challenge the sufficiency of the evidence to sustain a verdict or judgment, it is necessary that the bill of exceptions be certified to contain all of the evidence, else the presumption that there was other evidence received sufficient to sustain the verdict will be indulged by the appellate court. Again, where the record is contradictory upon material points, the appellate court will adopt that construction which sustains the judgment. Recitals in judgments are conclusively presumed to be true and are not open to attack.

§ 71. Error Must Be Prejudicial. It is not enough that it be shown by the record that an error in ruling has been made by the trial court, but under the general rules now prevailing it must also appear to the appellate court that the error was prejudicial to the appellant's substantial rights. Harmless error will work no reversal; nor can an appellant complain of errors affecting the interest of another party alone, nor of errors which he invited. So where

there is merely a trifling error in the amount of a judgment there will be no reversal under the principle of *de minimis non curat lex* (the law does not notice trifles). In general it may be said that courts are coming more and more to the doctrine that mere errors in procedure, even though of a serious nature, will not be allowed to reverse the judgment where it is apparent from the whole record that the final result reached is just. It follows, of course, that the reasons given by the trial court for its ruling are entirely immaterial. If the judgment or ruling attacked be correct for any reason, it will be affirmed, however erroneous the reason given below.

§ 72. Discretionary Orders. There are many minor matters concerning the details of pleading and practice and the conduct of trials which are within the discretion of the trial court, and orders made in such matters in the supposed discretion of the trial court will not be reviewed upon appeal, unless it be shown that the discretion has been abused. Among the matters generally held to be within the trial court's sound discretion are: the allowing of amendments to pleadings; the granting of references; the appointing of receivers; the continuance or postponement of causes; the extension of time within which to perform necessary acts; and the like. Discretion means a legal discretion, that is, the exercise of judgment based upon some legal ground; anything else becomes mere whim or caprice and is an abuse of discretion. If a court refuse to exercise its discretion on the ground that it has no power when in fact it has, the decision will be reviewed on appeal if the order be appealable by statute. Ordinarily in case of appeals from orders discretionary in their nature, the appeal will be dismissed where no abuse of discretion appears.

§ 73. Law on Second Appeal. When a case has been decided in the appellate court and sent back to the trial court for a new trial or further proceedings, both the trial court and the appellate court are controlled by the legal principles decided upon the first appeal. Any material proposition decided upon the first appeal becomes the law

of the case, however erroneous the appellate court may deem it as an original proposition, and even though it may have overruled it in another case in the meantime. The reason is that the first decision becomes *res adjudicata* (thing decided) for that case as soon as the time for rehearing has expired, and the appellate court cannot review its own decisions any more than the trial court can. The rule applies to decisions made by a divided court and to decisions at law and in equity, and it binds both the parties and their privies. Of course, if a different state of facts be presented on a second appeal to which different principles of law apply, the first decision is not conclusive so far as it is dependent on the peculiar facts presented by the first appeal.

CHAPTER X

FINAL DISPOSITION OF CAUSE

§ 74. **Dismissal.** Ordinarily an appellant will be allowed to dismiss his own appeal with costs without prejudice to his right to prosecute a second appeal, but it must be done by leave of court, and there may be special circumstances which will justify the court in refusing permission.

The appellate court will dismiss an appeal of its own motion where it appears that there is want of jurisdiction, or that the appellant has no right of appeal, or that there is no actual controversy, or that the action is collusive, and perhaps for other reasons. Appellate courts also have power to make rules for the dismissal of cases for want of prosecution, or for failure to appear at the time the case is set for hearing, and such rules universally exist. Motions by respondent to dismiss on account of technical defects in the proceedings for taking the appeal should ordinarily be made in writing, and served on the opposing party. In some jurisdictions such motion may be made orally when the case is called for hearing, but in other jurisdictions the defect is held waived by any act on the part of respondent or appellee which recognizes the existence of the appeal. If the defect be one which can be remedied, courts are inclined to permit it to be remedied on payment of costs, rather than to dismiss; but if the defect be jurisdictional and the time in which it may be remedied has already expired, dismissal must follow the motion. If a party die after the argument and submission of his cause, but before the decision, no substitution of parties will be necessary, nor will the action abate, but judgment will be rendered by the appellate court *nunc pro tunc* (now for then) as of the date of the submission of the cause.

The effect of a dismissal as a bar to a second appeal varies much in different jurisdictions and also depends much upon the cause. No general rule can be laid down, but the statutes and decisions of the particular jurisdiction must be consulted. The appellate court may, on cause shown, reinstate an appeal which has been once dismissed, providing the dismissal was not for lack of jurisdiction.

§ 75. Judgment by Default. It has been noted in the previous section that courts may and do provide for the dismissal of the appeal where the appellant fails to prosecute. It is generally provided, also, either by statute or rule, that in case an appellant fails to prosecute his appeal, the court will, on appellee's or respondent's motion, enter judgment of affirmance when the appellant fails to appear or file a brief upon the call of the case; thus preventing another appeal by entering a judgment on the merits. In some jurisdictions judgment of reversal will in like manner be entered in case the respondent or appellee fails to appear or file a brief when the case is called and the appellant is present ready for the argument or has filed his brief.

§ 76. Affirmance on Merits. Prejudicial error must appear from the record or the judgment will be affirmed. The general rule is that in jury cases where no prejudicial error in the rulings of the court or in the instructions to the jury appears, the judgment will be affirmed if there be any credible evidence to sustain the verdict of the jury, while in cases tried by the court the findings of fact will not be set aside unless there is a clear preponderance of the evidence against them. Judgment of affirmance necessarily puts an end to the litigation and prevents further litigation of the same question between the same parties or their privies, unless the judgment provide that the appellant may still apply to the lower court for a new trial. If the court be equally divided on the question of affirmance, or reversal, the judgment must necessarily be affirmed, because the court can take no affirmative action, hence the judgment must stand. The effect of such an affirmance is just as conclusive so far as the particular litigation is concerned

as if the majority of the judges voted to affirm, but it forms no precedent for future cases..

§ 77. Modification of Judgment. In most jurisdictions the appellate courts are given full power not only to affirm or reverse, but to affirm in part and reverse in part, or to modify the judgment below, or to return the case to the court below with directions to modify the judgment. The power to modify will not be exercised unless it is clear that all the material facts appear in the record and the controversy has been fully tried, so that exact justice can be done without further trial. Where it appears that material facts have not been brought out, and hence that injustice might be done, the court will not attempt to modify, but will send back for further proceedings. If the judgment be not justified by the verdict or findings, or is not responsive to the pleadings, or contains apparent errors which the record affords the means of correcting, the appellate court will ordinarily make the change or correction necessary and either enter the amended or modified judgment itself, or remit the case to the trial court with directions to make the necessary modifications. If the verdict be excessive and there be no error, the practice is general that the court may require a *remittitur* (reduction) of the excess to be entered and affirm the judgment for the remainder.

§ 78. Reversal of Judgment. In a case tried by a jury where the judgment is reversed for prejudicial errors in the admission of evidence or in the instructions to the jury, the appellate court will ordinarily remit the case to the court below for a new trial upon the general principle that by the constitutional provisions guaranteeing a jury trial in common-law actions, the defeated party is entitled to a trial without prejudicial error. If, however, it appear that the case has been fully tried and that upon the facts appearing only one judgment was possible, which was not rendered, or if the verdict be special and the proper judgment was not rendered thereon, the appellate court will in many, if not most, jurisdictions reverse the judgment and render

the proper one or send the case back with directions to enter the proper judgment. In equity cases or other cases tried by the court, the appellate court will ordinarily upon reversal either enter the proper judgment itself or direct the court below to enter it.

The effect of absolute reversal is to nullify completely the former judgment and leave the situation just as it was before the judgment was rendered; it also entitles the judgment debtor to recover any money or property of which he has been deprived by means of the judgment.

§ 79. **Remission of Case.** The theory of appellate proceedings is that the case is transferred to the appellate tribunal only for the purpose of ascertainment and correction of errors, if any, made by the trial court; hence, when this task has been accomplished, it logically follows that the appellate court should return the record to the trial court with its judgment, which either becomes the judgment of the trial court by virtue of the statute or requires the trial court to enter a judgment in accordance with the directions given. Technically the remission of the record with the mandate or judgment of the appellate court to the court below is necessary in order that the trial court may regain jurisdiction of the action. The time when the remission of the case must be made is fixed by statute or rule in the different jurisdictions and generally follows within sixty days after the decision of the case in the appellate court. A copy of the opinion is generally required to be remitted with the record that the trial court may know the grounds upon which the appellate court acted. The trial court can regularly do nothing until the *remittitur* and mandate are filed and then can only follow implicitly the directions of the appellate court if directions are given.

§ 80. **Costs.** Costs are purely a matter of statute in the different jurisdictions. In most jurisdictions costs are given as matter of right to the appellant upon reversal and to the respondent or appellee upon affirmance, while in some jurisdictions the awarding of costs in any case is discretionary. Generally, costs are discretionary where

the judgment is modified or partly reversed and partly affirmed. When allowed they are generally required to be taxed in the appellate court upon notice, and execution issues out of the appellate or trial court, as the particular statute may provide.

PRIVATE CORPORATIONS

PART I

CHAPTER I

NATURE, DEFINITION AND CLASSIFICATION OF CORPORATIONS

§ 1. Origin and Growth of Corporations. The idea that an aggregation or group of natural persons might, under authority from the State, form an artificial or juridical person possessing many of the powers of the persons composing it, and other rights and privileges apart from these in addition, has been recognized by the courts and law-makers from the earliest period. Such an artificial or juridical person is known as a corporation, the word being derived from the Latin corpus, meaning a body, as compared with the word animus, meaning the spirit or soul.

Corporations were mentioned in the twelve tables, the earliest known codification of Roman law. The rights of these juridical persons were discussed and fixed in the codes of Justinian, and it is needless to add form an essential part of modern law. The corporate form was limited at first to political or governmental organizations, but in Rome, before Christ, corporations were organized for many private objects, and encouraged or hindered in their organization and activities as best suited the purpose and policy of individual rulers at particular times. Aside from governmental organizations, their development and growth during the earlier part of the Middle Ages was limited, but in the latter part of this period a great commercial awakening led to the establishment of some of the greatest

of corporations, which engaged not only in the conduct of their own business, but also in the control of nations. The Hanseatic League was essentially a corporation which sought to gain commercial privileges through political influence. The East India Company, chartered under Elizabeth; the Merchant Adventurers of London, founded in the twelfth century; the Hudson Bay Company, founded in 1670; the Bank of England, chartered in 1649; the Bank of Genoa, as early as 1407, and the Hamburg Company, in 1248, are interesting and historical illustrations of the advantages gained by natural persons making use of the legal idea of a juridical person. It is unnecessary to refer to the tremendous development and increase of corporations, especially private, during the nineteenth century.

§ 2. Definitions. The best known definition of a corporation is that given by Chief Justice Marshall:¹

“A corporation is an artificial being, invisible, intangible, and existing only in the contemplation of law; being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it either expressly or as incidental to its very existence.”

Another definition prepared by Austin Abbott for the Century Dictionary is more concise:

“An artificial person created by law or under authority of law from a group or succession of persons and having a continuous existence irrespective of that of its members, and powers and liabilities different from those of its members.”

An interesting definition by the late Jay Gould, although not legally accurate, illustrates well the popular public conception of a corporation. He defined one as:

“A body of men who unite, associate and concentrate their ability, capital and intelligence in the undertaking of a work, great or small, which any one of them would individually be unwilling to undertake. If there are losses, they agree to pay each his proportion; if there are profits, they agree to divide them.”

¹ Trustees of Dartmouth College v. Woodward, 4 Wheaton (U. S.) 518.

From these definitions, the nature of a corporation clearly appears and the purpose of their organization is indicated in the definition of Jay Gould. Stated briefly, the commercial use of the private corporation is chiefly for the resulting convenience, economy, unity, and continuity in the transaction of business or management of property. Certain powers and functions can be exercised better by an artificial body than by a number of natural persons, and the State may better exercise over this collective body, this artificial person, its rights of control and regulation, than over a number of individuals. Great and advantageous economies in business can be effected by combinations of energy and capital. The development of the modern commercial world, as it exists today, would have been impossible but for the notion of a juridical person, the corporation.

§ 3. Nature and Power. The Roman idea of a corporation was an entity personified. A collection of individuals as opposed to the idea or notion of a *singularis persona*. The next development in respect to the nature of a corporation is to be found in the common law. This system emphasized the idea of a corporation as an artificial person; a legal entity distinct and separate from the members of the corporation, and this idea prevails at the present time, except so far as it has been modified by modern decisions which will be noted later. The early English judges and legal authors referred to the corporation as an artificial person, a being without a soul and incapable, therefore, of committing torts or crimes. Alluding to corporations, Lord Coke wrote, quoting from Manwood, J.:

“No one can create souls but God; but the king creates corporations, and, therefore, they have no souls.”

The common-law conception of a corporation as a distinct legal entity has been modified in modern times by the idea that in a corporation there exists certain elements which are purely manifestations of law, and also certain physical characteristics which are independent of law, namely, a membership of natural persons. Courts of law regard a

corporation as a distinct and legal entity apart from its members for the purpose of the transaction of its business in every detail. Courts of equity, however, in order to render substantial justice, regard a corporation not only as a legal entity, but also in its true light as an artificial person, composed ordinarily of natural persons.

In order to emphasize some of the essential characteristics of corporations they can be compared with a copartnership, another form of individual association or combination, and with natural persons. These essential characteristics, as thus compared, are, first, the idea of immortality; the corporation exists for the time limited in the charter, irrespective of the individual lives of those who may compose it; its powers and rights, its duties and obligations remain the same, though its members may be constantly changing; it is a legal person distinct from its members. The second characteristic is that in a corporation, in the absence of statutory or constitutional provisions, the members are not personally liable for the corporate debts. Each member of a partnership, on the other hand, is individually liable for the debts of the firm, and natural persons, *sui juris*, are liable to the fullest extent for obligations contracted by them. In a corporation, the liability of the individual members who compose it, is limited and is merged into or lost in the legally responsible person.

§ 4. Classification and Basis. In order to understand the powers and rights of corporations, and also their liabilities and responsibilities, it is necessary to learn their classification and its basis. The most important division of corporations is based upon the functions performed, that is, the legal characteristics of their powers and rights, whether exercising governmental powers, performing governmental duties, or engaged in the conduct of an enterprise having for its object the personal and individual gain of the members of the corporation. Under this classification we have public, private, and quasi-public corporations. Public corporations are those created by the sovereign power or state as aids to it in performing and exercis-

ing its governmental functions and powers. They are regarded as governmental agencies and include counties, school districts, road districts, towns, villages, cities, park boards, and other organizations of a similar nature. A private corporation is one created for the conduct and carrying on of a private enterprise or business, designed solely for the personal and usually the pecuniary gain or emolument of the individual members, and does not, nor can it, partake of the nature of a public corporation. There are other corporations which are technically and essentially private, engaged in some private enterprise but in which the public interests are indirectly involved to such an extent as to give the State the right of exercising a greater degree of control and regulation than is consistent or usual in the case of an ordinary private corporation. Familiar illustrations of quasi-public corporations are: railroad, express, elevator, street railway, telephone, and telegraph companies, and corporations organized for the purpose of supplying water and light to municipalities. The primary and direct objects of private corporations are to promote private interests in which the public has no concern except the development of the general resources of the country. They derive nothing from the State except the right of corporate existence and to exercise the powers granted.

Another classification of corporations is based upon the number of members and the terms used here are aggregate, indicating a membership of many and sole implying a membership of but one. There are few corporations sole in the United States. They are usually religious organizations represented by a church official to whom corporate power is given and who constitutes the corporation. Corporations may be also classified according to the purpose of their organization, whether religious in their character as ecclesiastical, or purely civil in their nature as lay. There are also many miscellaneous classifications, generally statutory or constitutional. The purpose of the division being the grant of particular powers to one class of corpora-

tions and not to others; in other instances a difference in methods of taxation or a variance in State control in still others. They are also divided into stock and non-stock corporations, the first having capital stock, so called; domestic, foreign, and alien, a division based upon the viewpoint of a particular State; a domestic corporation being one created and existing under the laws of that State. A foreign corporation is one created and existing under and by virtue of the laws of another State, and an alien corporation is one created by virtue of the laws of an alien or foreign sovereign. In some States the term domestic by statute is made to apply to corporations created under its laws, and the word foreign refers or applies to all corporations created under the laws of another State or country.

CHAPTER II

CREATION OF CORPORATIONS

§ 5. By What Authority. Individuals cannot, as a matter of right, assume the form and powers of a corporation. These bodies possess powers which can only be created by the sovereign State and which, therefore, cannot be assumed at will by any group of natural persons. Before a corporation can, therefore, be organized, there must exist affirmative action on the part of the sovereign authorizing this to be done. The power to create a corporation is lodged, in this country, in the law-making branch or department of government of either of the several States or of the United States. In foreign countries, controlled by one sovereign, no controversy exists as to where the power to create corporations is to be found; but in the United States, where there exists a dual sovereignty, viz., the United States of America and each of the different States, the question early arose as to the power of these respective sovereignties to create corporations. It was conceded that as each of the separate States was independent and sovereign, exercising all of the powers not specifically or by fair implication granted to the Constitution of the United States, that they could freely exercise the right of creating corporations, except as limited by the Federal Constitution. The doubt of right existed in connection with the power of the Federal Government to create a corporation, and this was denied by those attacking its exercise upon the basis of a strict interpretation of the Federal Constitution. The Federal Government is one of delegated powers, and it was claimed that nowhere in the Constitution, the instrument creating it, could be found a clause directly or expressly giving the power to create a corporation. In *McCulloch v. Maryland*,¹

¹ 4 Wheaton (U. S.) 316.

the question was decided in favor of the existence of the right. In this case the validity of the organization of the Bank of the United States was raised. The power to create this or any other corporation was denied, but Chief Justice Marshall, in his opinion, held:

“The power of creating a corporation, though pertaining to sovereignty, is not like the power of making war or levying taxes or of regulating commerce, a great substantive and independent power which can be implied as incidental to other powers or used as a means of executing them. It is never the end for which other powers are exercised, but as a means by which other objects are accomplished.”

The court also, in the course of its opinion, held that even if the general clause of the Federal Constitution giving Congress the power to pass all necessary and proper laws for carrying its powers into execution did not give the power to the Federal Government to create a corporation, it would still possess this power, for the grant of a power always and necessarily implies the grant of all usual and proper means for its execution. As a means to this end, therefore, and for the purpose of carrying out or of executing some power belonging to the Federal Government, it may, therefore, create corporations; and since the *McCulloch* case this power has been frequently exercised and has never been denied.

§ 6. Manner of Creation. Corporations may be created through the direct and affirmative action of the sovereign state, or in some cases by indirection. The acts of a law making body are known as general or special. A general act or law has been defined as:

“A statute which relates to persons or things as a class, while a statute which relates to particular persons or things of a class is special.”

The mere arbitrary grouping, classifying or arranging of certain objects will not, of itself, make legislation gen-

eral. There must be a logical basis for the desired effect, independent of conditions or circumstances then existing. In another case the distinction was noted in the following language:

“A law is general in the constitutional sense which applies to and operates uniformly upon all members of any class of persons, places or things requiring legislation peculiar to itself in matters covered by the law; while a special law is one which relates and applies to particular persons of a class, either particularized by the express terms of the act or separated by any method of selection from the whole class to which the law might, but for such limitation, be applicable.”

It was the universal practice at first to authorize the creation of corporations by either general or special acts or laws, but the inherent vice of special legislation led almost universally to the adoption of constitutional provisions in the different States prohibiting the creation of corporations by laws of that character. Where no such constitutional provision exists, corporations may be created, as already observed, by laws or acts of either class. Where, however, such constitutional provisions do exist, the manner of creating a corporation is limited to the general laws passed by the legislature relating to and providing a common method and procedure.

Through Indirection. Corporations may be also created through indirection, or by the absence of affirmative action on the part of the sovereign State. There are two ways recognized by the courts in which this may be done, viz, through the application of the doctrines of prescription and implication. A corporation is said to exist by prescription if its origin cannot be shown, and in such a case the law presumes, through the lapse of time, that the corporation came into existence through or by an act of the sovereign. This doctrine is applied more frequently to public corporations, but in some instances private corporations have been held to be thus created.

By Implication. As no particular form of words is necessary to create a corporation, but rather the existence of an intent on the part of the sovereign to so act, it has been held that where a body of men, acting as a corporation, have been recognized as such in some law or by some direct act of the sovereign, that there is impliedly created a corporation. This doctrine also has been applied more frequently to public corporations than private, but instances of its use in respect to the latter have been found. It might be said, however, that the doctrines of prescription and implication are seldom applied at the present time. The different States have provided either general or special laws under which corporations may be created, and, as will be noted later, one of the essentials of a legal corporation is a substantial compliance with their provisions.

§ 7. Constitutional Limitations. One constitutional limitation upon the power of the law making body to authorize the creation of corporations was noted in the preceding section, viz., a constitutional prohibition against the passage of special laws. In addition, there will be found further limitations in all constitutions upon the power of legislative bodies as to the manner and the form of their action. These limitations apply equally to legislation in respect to corporations as to other subjects. The reader must refer to the Constitution of his own particular State in order to be correctly informed as to the extent and the character of such restrictive provisions, but one or two may be suggested which are commonly found. Laws, as a rule, must be uniform in their operation throughout the State; that a bill deals with only one subject and that the one expressed in its title, is another constitutional requirement which may be urged against legislation looking to the organization or the control of corporations. There are many others, but only the suggestion of their existence is permissible at this time.

§ 8. Organization under General Laws. Justice Story said, in the Dartmouth College case, that the creation of corporations unquestionably resulted in an advantage and

benefit to the community at large, and because of this well recognized result it is the policy of all States to encourage their organization, and general laws are to be found under which exists, as a rule, the greatest freedom of action by individual persons in this respect. These general laws provide in detail the acts required to be done by those desirous of organizing or forming private corporations. They may include a classification either based upon the powers to be exercised by the corporation, or some right of the State in respect to the nature and extent of its control over them. Definitions are also given of the phrases and words used, and such preliminary provisions as will enable the incorporators to ascertain the steps required.

§ 9. Steps Required for and Essentials of Legal Incorporation. The requirements in the States differ, but it is generally necessary to include in the articles of incorporation paragraphs or sections relating to the name of the corporation; the general nature of its business and the principal place of transacting the same; the period of its duration, if limited; the names and places or residence of the incorporators; the board of management, with its powers; the date of its annual meeting, and the names and addresses of those composing this board until the first election; the amount of capital stock, if any; how the same is to be paid in; the number of shares into which it is to be divided; the par value of each share and the methods of voting thereon; and the highest amount of indebtedness or liability to which the corporation shall at any time be subject. There is usually no limitation upon articles of incorporation containing also other lawful provisions defining and regulating the powers or business of the corporation, its officers, directors, members, or stockholders. These articles of incorporation, when executed by the incorporators in the manner provided by law, are required usually to be filed with the Secretary of State or some other designated officer, the fees fixed paid and then published in the manner designated by law in some newspaper and recorded in the office of the Register or Recorder of Deeds of the county in which its

principal place of business is located, or some officer performing equivalent duties. It is also necessary, as these various steps are taken, to have the proper official certify, in the manner provided, as to his official acts.

Incorporators, Name, and Seal. It will appear later that the relation which exists as between the corporation and the State, and the members of the corporation, is a contract one, and it is necessary, therefore, that the incorporators should be persons *sui juris*, or those legally competent to enter into the contract relation. The number also of incorporators or those signing the articles of incorporation cannot be less than fixed by statute. This number will vary; for the purpose of organizing corporations of certain classes a larger number may be required than in the case of others.

The incorporators are not permitted to adopt any name they please, but are limited, as a rule, to that name which will distinguish it from all other corporations, domestic or foreign, authorized to do business within the State of its creation, and the word company, corporation, or incorporated, is usually required to be added to indicate the fact that it is an incorporated association or corporation. In some States assuming a corporate name or one suggesting corporate existence, without actual incorporation, is made unlawful.

The corporate name and its use after adoption is protected by law, and many decisions will be found holding that corporations organized under the laws of different states cannot adopt or use a name similar, where their business is interstate and general and of a like nature, as to cause confusion in the use of the name; or where a later company adopts a name already in use by some well known corporation and which is adopted for the evident purpose of availing itself of the reputation and business of the company already organized.

Corporations are usually required by statute to provide a seal bearing the name, and, in some instances, the date of incorporation. Statutory provisions also may require, in

many instances, the use of this seal by the proper officer of the corporation in order that a particular instrument may be regarded as legally acknowledged or entitled to record in the offices of recording officials. Formerly the rule adopted by the courts was that the corporation "spoke through its seal." This doctrine required its frequent use, and further involved the idea that unless the seal was affixed to the written acts of the corporation they were not legally executed, and, therefore, incapable of enforcement; or that no legal rights arose or were created because of or through the execution of the particular instrument in question. This strict rule has been materially modified in recent years, and it is only where statutory provisions require the affixing of the seal that a failure to use it will lead to the legal results above indicated. It is the safest procedure, however, for the corporation to have its seal affixed on all formal instruments or contracts which it may execute or make.

Essentials of a Legal Corporation. From what has already been written and from what will appear later, it is clear that a corporation is a legal entity or artificial person, distinct and separate from its members, having powers and liabilities also separate and distinct from those of its members. That the liabilities and obligations of the members of the corporation are different from their obligations and liabilities as natural persons, or as members of a partnership, or other association of natural persons. It cannot be too emphatically stated that this liability is a limited one. The liability of a member of a firm—unless one is a special partner—is only limited by the extent of the debts of the firm. His personal estate may be taken to liquidate the debts of the partnership. The liability is a personal one. The liability of a natural person, *sui juris* (of his own right) for his debts is also a personal one and only limited by their extent. It may be, therefore, very important to determine the exact legal status of an association of persons whether a corporation or some other form of organization. To ascertain when a legal or *de jure* (of right).

corporation exists, the courts have held that certain essential facts must be found, and these are commonly known as the tests of legal incorporation.

Grant from State, and Acceptance. The first of these essentials is the existence of a grant or offer on the part of the State under which a corporation may be organized; or, as some cases have expressed it, a legislative grant is necessary. This is essential because a corporation exercises powers and capacities different from those of a natural person or any other form of association or natural persons other than a corporation. The powers enjoyed by corporations are very frequently those which cannot, because of the nature of things, be possessed or exercised by natural persons, as, for example, the capacity of immortality. Not only must there exist a legislative grant on the part of the State, under which corporations may be organized, but there must also be an acceptance of this grant by those desirous of organizing a corporation. This acceptance is usually evidenced by the execution of the articles of incorporation, the organization of the corporation and the transaction of business by it in its corporate capacity. This essential or test of a legal corporation is necessary because of the contract relation existing between the members of the corporation and the State. The State cannot compel natural persons to organize a corporation or undertake the business of conducting one. In this respect the principle is totally unlike that which applies to the public corporation. In the organization of public corporations, the State can arbitrarily force upon the people of a particular locality a form of organization or a local government having for its purpose of the assumption and exercise of governmental powers and functions. No acceptance by the persons to be affected is necessary. A private corporation, however, is, in its nature, radically different from that of a public corporation. It is organized for totally different purposes and results. The public corporation, from the standpoint of the persons affected, is an involuntary organization. The private corporation is the result of a purely voluntary act

by those desirous of organizing it. If no acceptance, therefore, of the grant or offer of the State to organize a private corporation, by those constituting the alleged corporation, can be shown, one of the essential tests has failed, and that particular body of men will not be regarded as a legal corporation.

Agreement between Members. Because of the contract relation which exists not only between the State and the corporation, the State and the members of the corporation, and also between the members of the corporation, or as among themselves, it is necessary that there be an agreement or understanding between those organizing a corporation that this is the nature of their act. If one of the incorporators understands that the instrument he is signing is a conveyance of real property instead of articles of incorporation, the meeting of the minds necessary to the making of a legal contract is wanting, and another of the tests of a legal incorporation has failed.

Compliance with Statutory Provisions. There must also be a substantial compliance with statutory requirements in order that a legal corporation may exist. "A substantial compliance with all the terms of a general incorporation law is prerequisite to the right of forming a corporation under it." It is necessary that the required number of incorporators sign the articles of incorporation. The law authorizing the incorporation of corporations may contain provisions mandatory or merely directory in their nature. These terms are self-explanatory. The principle of law in respect to mandatory provisions is that not only must there be a substantial but even a strict compliance, and this is especially true where certain conditions precedent to legal incorporation, as they are termed, are required by the statutes. A strict compliance with the provisions of the law which are merely directory in their character is not necessary, and there may be a variance or an immaterial irregularity in following them which will not affect the legality of the corporation. These irregularities or informalities afford, as a rule, no basis for an attack upon the

legality of the corporation by third persons. The State alone can take advantage of them if it so desires, and even the State may be barred from such proceedings by lapse of time. The signing of the initials instead of the full Christian name to the articles of incorporation; the statement that "said corporate stock shall consist of five hundred shares at one hundred dollars per share" when the statute required that the certificate of incorporation "shall state the amount of capital stock"; the statement that the corporation shall exist "at least forty years" when the statute provided that the certificate should state "the term of existence not to exceed forty years," are illustrations of irregularities which will not affect the legality of the organization.

The statutes may, however, contain provisions which are intended to be conditions precedent to incorporation, for example, the execution of the articles of incorporation. These are usually regarded as mandatory and must be strictly complied with before a legal corporation can exist. The intent of the law in this respect must be gathered from its language, and no general rule can be stated which will enable one to determine what are intended to be conditions precedent and, therefore, mandatory as to compliance with them, and what are regarded as general provisions of the law or those which are merely directory, and in respect to which a strict compliance is not necessary.

§ 10. The Doctrine of Collateral Attack. Since it is the State which alone creates the corporation, and not third persons who may have dealings with it, the doctrine of collateral attack, as it is termed, is universally followed by the courts. The presumption of law is that the corporation has been legally and regularly organized and that it is a legal incorporation. All that is necessary, therefore, except in direct proceedings by the State in which the main question or issue is the legality of the corporate existence, is that the corporation establish its character as a *de facto* corporation, or one existing in fact, although possibly not in law. All that is necessary to be shown is that there is

a valid law under which such a corporation might have been organized; an attempt in good faith to incorporate under the law; a colorable compliance only with the provisions of the law, and an exercise of corporate powers in a corporate capacity. The subject of *de facto* corporations will be considered later.

§ 11. Corporations as "Citizens" or "Persons". In an early case in the United States Supreme Court, *Bank of Augusta v. Earle*,¹ it was decided, and the doctrine has never been denied, that a corporation, for the purpose of jurisdiction, was a citizen of the State under the laws of which it was created. The stockholders are arbitrarily held to be citizens of that State, and the fact of their diverse citizenship, therefore, will not affect the citizenship of the corporation. Even where a corporation doing business in several States has been organized under the laws of the different States by the same name, the rule is not changed. This principle is nearly axiomatic, as the laws of the different States can have no extra-territorial effect. When the term "citizen of the United States" or "citizen" is used in the Federal Constitution, it has been held that a corporation is not a citizen; but in the fifth and fourteenth amendments, where the term "person" is used in connection with several prohibitions against the States having for their object the protection of personal and property rights, the courts have held that corporations are persons within the meaning of the term as there used, and that they, therefore, come within the protecting provisions of these amendments, that no State can pass any law depriving any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

Corporations, as a rule, are deemed persons within the meaning of State statutes when the circumstances in which they are placed are identical with those of natural persons who are included within the operation of the statutes.

¹ *Bank of Augusta v. Earle*, 13 Peters (U. S.) 519.

CHAPTER III

PROMOTION OF CORPORATIONS

§ 12. Definition of Promoter. It is difficult to give an exact definition of the word promoter, as the relation which is indicated by the word depends upon the character of the acts done in each particular instance. The law imposes serious responsibilities upon those who engage in the organization and promotion of corporations and holds them substantially to the position of a trustee for the benefit of all those who may be directly involved in the undertaking. The term has been defined as "one of accepted use commonly employed to designate persons who take some part in procuring the promotion of a corporation by inducing others to join it, and who, in so doing, assume such a position that a relation of fiduciary nature between these and the corporation is created." From this definition and from the nature of the question it will be readily seen, as already suggested, that the relation is one depending upon the character of the acts done.

§ 13. Fiduciary Position of Promoters and Secret Profits. Since the law has well established the fiduciary or trust position of a promoter to the corporation and others directly interested in it or its organization, it necessarily follows that promoters cannot take personal advantage of their transactions or acts done in connection with the organization of the corporation to its detriment or to the detriment of its members, and this rule is especially applicable where those who are entitled to act for the corporation have no knowledge or information in respect to the profits, commissions, or other advantages which may be derived by the promoters from their transactions in promoting the corporation. If any agreements or contracts, by which the promoters receive special advantages or

profits, are disclosed to those entitled to act for the corporation and its members, and their assent obtained, the rule is not so strictly applied, unless the profits or commissions are exorbitant or unconscionable, promoters, therefore, it is universally held, must account to the corporation for all secret profits, commissions, or bonuses which they may receive in connection with the purchase for or the sale of property to the corporation. They may also become liable to the corporation for their acts of a fraudulent nature, or for their misrepresentations under the same circumstances as individuals who are not promoters would be liable. The corporation may, by means of the proper proceedings in a court of equity, by or for its benefit, recover secret profits or commissions, or, at its election, rescind a sale of property to it and recover the consideration paid therefor.

§ 14. **Personal Liability of Promoters.** The acts of promoters are usually done in furtherance of the organization of a corporation not yet in existence. Their contracts and transactions are made for and in behalf of an artificial person not yet in existence. It may, as a matter of fact, never be fully and completely organized so as to become even a *de facto* corporation, that is, one existing in fact but not a strictly legal entity or *de jure* corporation. The question, therefore, frequently arises of the liability of the corporation when it is legally organized, upon the contracts or agreements of the promoters previously made for the benefit of the future corporation. In England, the rule is that in the absence of statutory or charter provisions, a contract made under such circumstances by the promoters is a nullity and that the corporation cannot ratify or adopt it thus making it its own after incorporation, although if it accepts the benefits of such a contract an action *quasi ex-contractu* (as if on a contract) may be maintained against it. This doctrine is also followed by the Supreme Court of Massachusetts.¹ The English doctrine, however, has been substantially repudiated in all the other States. The personal liability of the promoters

¹ Abbott v. Hapgood, 150 Mass. 248, 22 N. E. Rep. 907.

on contracts made before incorporation will depend largely upon the question of the intent of the parties to the contract. If it is understood or agreed that the other party shall look to the proposed corporation alone, the promoters are not, as a rule, personally bound by the terms of the contract, but, in the absence of such an understanding, or of such an intent, as shown by the facts and circumstances surrounding the making of the contract, they will be personally obligated. If, however, the corporation, later, upon its formation, assumes or adopts the contract, and the other party to it consents, there is then a novation of the parties and the promoters will be relieved from any personal liability. If such consent is lacking, however, the liability still attaches to the original parties to the contract. If they are personally bound, it follows, necessarily, that they can enforce the terms of the contract in an action thereon in their own name.

§ 15. Liability of the Corporation on Promoters' Contracts. It has already been stated in the preceding section that the rule in England and in Massachusetts relieves the corporation from any liability on the contracts of its promoters, although, if its benefits have been received and accepted by the corporation an action *quasi ex-contractu* may be maintained by the corporation upon it. The overwhelming weight of authority is, however, that a liability for the obligations of a contract may be and is shifted from the promoters to the corporation, not only by an acceptance of the benefits as above stated, but also if there is an express assumption by the corporation of the contract, in which case there will arise a novation between the parties; or, if the corporation, acting through its proper representatives, formally ratifies the contract. To summarize: it will be seen that the burden of the promoter's contract made before the organization of the corporation, or on behalf of the corporation, in existence but not yet engaged in the transaction of its business, may be shifted from the promoter as one of the parties to the corporation when the corporation accepts the benefits of the contract, formally assumes or

adopts it, or legally ratifies the act of the promoter in making the contract for its benefit. In the latter case, the corporation formally recognizes the promoter as its agent and ratifies his acts on its behalf previously done without authority. It is true that no relation of agency can exist between a promoter and a principal not yet in existence, and subsequent action by the corporation is necessary to make it liable for the private acts of the promoters.

§ 16. Fraudulent Acts of Promoters. Neither the corporation, when it is subsequently formed, nor subscribers for its stock, will be bound by the fraudulent acts of promoters. If the subscriptions are obtained through fraudulent representations made either orally or in writing, the one who is misled may recover the resulting damages from the promoters. This rule does not depend upon the fact that the misrepresentations or untrue statements of material facts may not be made to the subscribers of the stock personally. It is sufficient, in this country, if the statements, the natural tendency of which is to deceive and mislead and to induce those who read them to purchase the stock, are made or contained in circulars, advertisements, prospectuses, or other published matter issued for the purpose of obtaining subscriptions, and on the faith of the statements contained in them the subscriptions were so made.

§ 17. Expenses and Services of Promoters. Promoters, in organizing a corporation not yet formed, frequently incur heavy expenses and render services, payment for which they subsequently seek to recover from the corporation. The courts have held that the legitimate expenses of organization and a reasonable value for their services may be recovered, but extravagant claims for services, unnecessary or illegitimate expenses, are usually disallowed. In case of a failure to organize a corporation, the promoters, as a matter of course, are liable, personally, for expenses which they may have incurred, and they are also liable, in addition, for moneys which may have been received from subscribers to the stock of the proposed corporation as a

deposit or a preliminary payment on account of their subscriptions. As to the latter, if there is no understanding between the subscribers and the promoters, the moneys so received must be repaid in full to the original subscribers, and a proportionate part of the expenses of organization can not be retained by the promoters. If, however, there is an understanding or agreement by subscribers that they shall bear their proper share of the expenses of organization, including disbursements and the value of the services of the promoters, these are a proper charge against the moneys so paid in and no action will lie for a recovery of sums so retained.

CHAPTER IV

QUESTION OF LEGAL EXISTENCE HOW AND BY WHOM RAISED

§ 18. **De Jure and De Facto Corporations.** The terms *de jure* and *de facto* have already been used in a preceding section, and a brief discussion of what is understood by them will be given in this chapter. A corporation, it will be remembered, is a distinct artificial person, a legal entity, created by the sovereign or under its authority, exercising powers and possessing capacities not belonging to a natural person or group of persons other than a corporation. The State, speaking of it as a sovereign power, alone has the authority to create, and by statutory enactment prescribes the conditions and the manner in which a corporation may be organized. When these conditions have been substantially complied with there results a corporation *de jure* which can successfully defend its right to exist in a corporate capacity even against the State. Those organizing a corporation, on the other hand, may fail to comply with statutory conditions to such an extent as to defeat the legal existence of the corporation not against third persons raising the question, but as against the State in a proper proceeding brought by it for that purpose. Such a corporation is known as one *de facto*. What is the attitude of the courts in respect to the regularity of corporate organization when the question is raised? There are two doctrines or theories in this respect, the great weight of authority, on the one hand, holding that where a body of men act as a corporation and in the ostensible possession of corporate powers, it will be conclusively presumed that they are a corporation in all cases, except in a direct proceeding against them by the State to vacate their charter. The other doctrine can be stated

as follows: that conditions precedent must be strictly complied with or the corporation does not exist. The failure can be taken advantage of by anyone in private litigation with the pretended corporation. The common and almost universal legal doctrine is, that in respect to the existence of a legal corporation, the presumption of legality exists. This principle is merely another phase of the doctrine of presumption of right acting. A man charged with crime is presumed innocent until he is proven guilty by the State. One acting as a public official in the ostensible possession of an office is presumed to act under rightful authority and to be legally entitled to perform the duties of the office until the contrary is shown, and the same presumption of right acting operates as above stated. Corporations are presumed to be at least *de facto*, and the further rule holds that the question of their right to corporate existence cannot be raised by third persons engaged in private litigation with them. The term *de facto*, as applied to a corporation, means a body which actually exists for all practical purposes as a corporate body, but which, because of a failure to comply with some provisions of the law, has no legal right to corporate existence as against the State. A corporation *de jure*, on the other hand, is a corporation in law as well as in fact. Not even the State can deprive it of its corporate existence in violation of the terms of its charter.

The doctrine of *de facto* corporations, as it is termed, is based upon the fundamental doctrine that the State alone creates a corporation, and that no third person can question the right of a group of persons, apparently clothed with corporate capacity, to act as a corporation. If the State chooses to ignore a failure to comply with the provisions of laws enacted by it, that is its privilege. In a Minnesota case¹ this reason was well stated:

“The rule relating to *de facto* corporations is not founded upon any principle of estoppel, as is sometimes assumed, but upon the broader principles of common justice and

¹ East Norway Lake Church v. Froislie, 37 Minn. 447-451.

public policy. It would be unjust and intolerable if, under such circumstances, every interloper and intruder were allowed thus to take advantage of every informality or irregularity of organization."

The rule is also based upon the universal principle that a person, to be entitled to maintain a proceeding to question the powers, rights, privileges, and immunities of others, must have some title or legal or equitable interest in the subject in regard to which these exist, or one's rights must be affected. Clearly, third persons dealing with corporations have no right to question the validity of corporate organization in actions where this question is not one which can be regularly raised or is the main issue. The validity of corporate organization cannot be collaterally attacked.

§ 19. Essentials of a De Facto Corporation. To constitute a legal or *de jure* corporation, it is necessary that there exist an offer on the part of the State or a legislative grant, an acceptance of this grant by the incorporators, an agreement between them as to the nature of their act, a substantial compliance with conditions precedent, and the enabling statutes. If these essentials exist the result is a corporation *de jure*, which is secure in its corporate life even as against the State, unless it violate some provision of its charter. To constitute a corporation *de facto*, it is only necessary that there should be found, in the first place, a valid law and one which authorizes such a corporation. To be a corporation *de facto*, it must be possible to be a corporation *de jure*, and acts done in the former case must be legally authorized to be done in the latter or they are not protected or sanctioned by law. The acts of a corporation *de facto* must have an apparent right.

The second necessary condition to the existence of a corporation *de facto* is an attempt on the part of the incorporators, in good faith, to organize under the law. There must be the *bona fide* attempt on the part of those organizing the corporation to take the necessary steps to organize one and to become a corporation. The courts also hold

as a third test of a corporation *de facto* that there must be a colorable compliance with the conditions of the enabling statutes. It will be remembered that a substantial compliance with the provisions of the enabling act or a strict compliance with conditions precedent is necessary to constitute a corporation *de jure*. What is understood as a colorable compliance? The best answer, perhaps, is a quotation from a case.²

“When a body of men are acting as a corporation under color of apparent organization in pursuance of some charter or enabling act, their authority to act as a corporation cannot be questioned collaterally. . . . Color of apparent organization under some charter or enabling act does not mean that there shall have been a full compliance with what the law requires to be done when there is a substantial compliance. A substantial compliance will make a corporation *de jure*; but there must be an apparent attempt to perfect an organization under the law. There being such apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the body being a corporation *de jure*. But if there be user, pursuant to such attempted organization, it will not prevent it being a corporation *de facto*.”

As the last essential of a corporation *de facto*, the courts hold that not only must there exist the conditions previously noted, but that the persons so attempting to organize a corporation must proceed farther; they must proceed to an assumption of corporate powers or corporate user, as the phrase is found. The acts relied upon to show user, must be in their nature corporate acts and not the mere acts of individuals which happen to be not inconsistent with those of an incorporated society.

§ 20. **The Powers of De Facto Corporations.** A corporation *de facto* is, to all intents and purposes, for the transaction of its corporate business, one *de jure*. It is recognized by the courts as a corporation and not otherwise; its right to so act cannot be questioned collaterally by third

² *Finnegan v. Noerenberg*, 52 Minn. 243.

persons, and it necessarily follows that the corporation can sue and be sued, execute contracts, buy and sell property, exercise the power of eminent domain; in brief, exercise all of the powers that a corporation *de jure* of a similar character or nature might.

§ 21. **Estoppel to Deny Corporate Existence.** Another legal principle is applied by the courts against third parties questioning the right of a group of persons to exercise corporate powers. This principle may be briefly stated, that persons who transact business or assume contractual relations with what purports to be a corporation are equally with the corporation itself estopped to deny the validity of the incorporation in actions brought to enforce liabilities growing out of such transactions. This principle applies to those holding themselves out as a corporation, the corporation itself and third persons dealing with the corporation. The doctrine of estoppel is based on equitable grounds, and should, therefore, be applied only where there are equitable reasons for relief. It is rarely that this principle is applied, however, as the doctrine of *de facto* corporations, as stated in the preceding sections, is universally followed and is held sufficient to prevent an attack on corporate existence by third persons, the use of the doctrine of estoppel being, therefore, unnecessary. In a Michigan case,⁸ the court said:

“Where there is thus a corporation *de facto* with no want of legislative power to its due and legal existence, where it is proceeding in the performance of corporate functions and the public are dealing with it on the supposition that it is what it professes to be; and the questions suggested are only whether there has been exact regularity and strict compliance with the provisions of the law relating to incorporation, it is plainly a dictate alike of justice and of public policy that in controversies between the *de facto* corporation and those who have entered into contractual relations with it as incorporators or otherwise, such question should not be permitted to be raised.”

⁸ Swartout v. Michigan Air Line R. R. Co. 24 Mich. 390.

§ 22. Organization under an Unconstitutional Law. A common rule of law is that an unconstitutional law is the equivalent of no law, and where an attempted organization has been had under a law which is subsequently declared unconstitutional the attempted corporation will not be regarded as even a *de facto* corporation, and acts done by it will not be regarded or held to be corporate acts. The liabilities and the obligations of the pretended corporation will be considered as the personal liabilities and obligations of its members.

CHAPTER V

**THE STATE AND THE CORPORATION
ITS CHARTER**

§ 23. Visitorial Power. The greater number of private corporations, until within recent years, were of a charitable or ecclesiastical nature, and it was customary for the founder of such a corporation or institution in the organization of the corporation, accompanied generally by a donation of funds for its establishment and maintenance, to provide that a representative, to be selected by him or his heirs, should have the right of "visiting" the institution in order to determine whether the purposes and objects, for which it was originally created were being carried out and in a manner in conformity with the original intentions and wishes of the founder. This power of visitation, as it was termed, is, in a historical sense at least, the basis of the right of the State to control and regulate the conduct and the business of private corporations. The deeper reason, as well as the true one, is not derived from the ancient power of visitation, but depends upon the legal proposition that the State creates the corporation and that it alone has this power. All corporations, therefore, assume a corporate existence and engage in the conduct of their business subject to the supreme power of the State to regulate and to control them. This power is only limited by constitutional provisions having for their purpose the protection of fundamental and vested personal and property rights, and since, as will be stated later, the relation between the State and the corporation is a contract one, the power of control and regulation must be exercised in the manner provided by charter and in accordance with the same general principles of law which govern contracts between individuals.

§ 24. **Control of Quasi-Public Corporations.** In that section containing the classification of corporations, a division was given based upon the nature or character of the functions performed respectively by different corporations, corporate organizations falling within this classification being known as public, quasi-public and private, or, strictly speaking, public and private, the quasi-public corporation being, in all its essential characteristics a private one. The control by the State of public corporations is absolute, except as limited by constitutional provisions. The extent of the power of control of private corporations by the State is indicated in the preceding section.

Quasi-public corporations are private corporations but the conduct of their business affects the interests of the public in a large sense, and for this reason they are subject to a greater degree of control and regulation by the State than other private corporations not falling within this class. It is this fact which gives rise to the designation or term of quasi-public corporations. This principle of greater control and regulation was first authoritatively announced by the Supreme Court of the United States in the so-called Granger cases. The one most frequently cited is *Munn v. Illinois*,¹ where Chief Justice Waite, in the majority opinion, said:

“Their business is therefore affected ‘with a public interest’, within the meaning of the doctrine which Lord Hale has so forcibly stated. But we need not go further. Enough has already been said to show that when private property is devoted to a public use, it is subject to public regulation. This brings us to inquire as to the principles upon which this power of regulation rests in order that we may determine what is within and what is without its operative effect. Looking then to the common law, whence comes the right which the Constitution protects, we find that when private property is affected with a public interest it ceases to be *juris privati* (of private right) only.”

The question at issue in the *Munn* case was in respect

¹ 94 U. S. 77.

to the power of the State to fix maximum rates of storage to be charged by grain elevators, and because the business so carried on affected, as the court held, the public interest, it was subject to a greater extent to the regulative powers of the State. Familiar illustrations of quasi-public corporations are: common carriers, gas, telegraph, telephone, elevator, and express companies.

This power of regulation is generally exercised by the State through administrative boards or commissions created by law and limited strictly in the exercise of their powers to those granted directly or specifically by statute. The Federal Government exercises its supervisory powers over common carriers engaged in the business of conducting interstate commerce through the Interstate Commerce Commission.

When the doctrine of regulation was definitely and authoritatively established by the decision in the *Munn* case, the popular idea of the effect of the decision was that the power to regulate could be exercised by the State without restraint. The Supreme Court of the United States, in the next case² before it involving the same question, hastened to hold that the power of regulation was not an equivalent of the right of confiscation and that the State could not in the exercise of the power possessed deprive private corporations of their property without due process of law, or appropriate their property without the payment of just compensation. The court, in its opinion by Chief Justice Waite, said:

“From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation or without due process of law.”

² *Stone et al. v. Farmers' Loan & Trust Co.* 116 U. S. 307.

The modified doctrine of the *Munn* case, as thus stated in the *Stone* case, has been repeatedly followed by the Supreme Court of the United States, and is the established doctrine, therefore, relating to the exercise of the power of regulation of quasi-public corporations by the State. The power to regulate is not synonymous with a power to destroy or to confiscate, but must be exercised within constitutional provisions not contrary to constitutional prohibitions, and must be of a reasonable character.

§ 25. **Power of Regulation Further Considered.** The power of regulation, as stated in the preceding section, and in respect to quasi-public corporations, is based upon the distinction between a public employment and a private business, and depends upon the fundamental duty of the State to protect the public and to prevent extortion and discrimination in the supply of the necessities of life, whether these are articles consumed or services rendered. Whether a business is public or private seems to depend upon whether it is a monopoly or not. The distinction between a public employment and a private business is an old one, and in respect to public employments there has been a persistence of State regulation for many years. Necessarily, with changed commercial and social conditions employments considered public many years ago have ceased to be regarded in this light, and others formerly considered as private in their nature are now held to be public employments. The grant of legal privileges is not necessarily a ground for regulation. The right of eminent domain given by the State to certain quasi-public corporations does not make them such, but this right is granted by the State because of the nature of their business as a public employment. The authorities are fairly well agreed that virtual monopoly is the only basis of regulation, and this may exist either by or through the grant of exclusive privileges or franchises, so-called; through the character of the business conducted or carried on by the corporation; through the existence of an established plant the duplication of which by other corporations could only be accom-

plished by the expenditure of large or prohibitory sums of money; through the exclusive ownership of natural products, a limited supply of which exists; or through the ownership of natural locations especially adapted for the rendition of the service or the manufacture of a particular commodity.

§ 26. The Objects of Regulation. The courts are agreed that the two chief objects of the regulation of quasi-public corporations are: first to prevent extortion and to secure a reasonable charge for the service rendered or the commodity supplied; and, second, to prevent discrimination or the giving of undue preferences either as between persons and localities or in service.

From the standpoint of the quasi-public corporation which, it will be remembered, is a private one, the process of regulation cannot go to the extent of fixing a charge for its services so low that no return or an unreasonably low return will be had upon the private property invested in the enterprise. If this is done, it will amount to a taking of the property without due process of law; or a confiscation of property without the payment of just compensation; and these results are prevented through the application of constitutional provisions. The courts have held that the rendition of services, transportation by common carriers, for illustration, is property, and that the State cannot fix, in the exercise of its regulative powers, so low a price to be paid by the public as to compel it to carry on its business at a loss, or otherwise than as indicated in the following paragraph. This, they say, would be a confiscation of private property or a taking of private property belonging to a private corporation without due process of law.

In general, therefore, the courts, without exception, have sustained the doctrine that the rendition of a service, whether that of transportation or the supplying of some commodity, is property within the meaning of constitutional provisions relative to the taking of property without due process of law, or without the payment of full and

ample compensation when it is private, as in the case of all quasi-public corporations, for a public use. The rates charged by water and gas companies, telegraph, telephone, common-carriers and others of a similar character, while they cannot be exorbitant, unreasonable, or discriminatory, must be such as to afford the private property employed in such an enterprise a fair return upon the investment, taking into consideration the character of the service rendered, the nature and risks of the particular business and the return afforded upon the investment of private capital.

§ 27. The Charter of a Corporation: Its Legal Nature. The charter of the corporation is the source of its powers, and it has been held to include not only the popular concept of a charter, viz., the articles of incorporation, but, in addition, constitutional provisions and general laws affecting the particular corporation under consideration and decisions of the highest courts construing, interpreting or applying phrases and words to be found in any of the three things noted.

It is regarded, in its legal nature, as a contract³ which may be defined as an agreement upon a sufficient consideration to do or not to do a particular thing, and the essentials are mutuality or a meeting of the minds in respect to the object or subject of the contract and a consideration. As a contract, it has been held that it comes within that provision of the Federal Constitution prohibiting a State from passing any law impairing the obligation of a contract. The parties to this contract are the State and the corporation; the State and the members of the corporation; the corporation and its members; and in some instances the creditors of the corporation have been regarded as parties to the contract relation.

§ 28. The Charter as a Contract. The several contractual relations enumerated in the preceding section can be somewhat amplified:

First, the charter as a contract between the State and

³ Trustees of Dartmouth College v. Woodward, 4 Wheaton (U. S.) 516.

the corporation. It is evident that the grant of corporate rights may contain valuable privileges of which the corporation cannot be deprived by the State under the contract theory. The right to conduct a certain business; a prescribed period of time during which this can be done; the manner or the place in which the corporate business can be transacted; in fact, nearly all of the powers of the corporation as contained in the charter constitute valuable privileges and form a part of the contract which exists between the State and the corporation.

Second. The charter as a contract between the State and the stockholders. The right to charge a certain rate of interest upon loans as granted by a corporate charter; a particular method provided for the election of directors by the stockholders; their power to elect directors by cumulative voting, and certain prescribed rights of the minority in respect to the management of the corporation are illustrations of charter provisions which may constitute contract rights.

Third. The charter as a contract between the stockholders. The contractual nature of the relation between the stockholders is so plain as to require no more than its mere suggestion. The members are bound by charter provisions in respect to internal management or control. Through the operation of this principle, the majority of the members cannot adopt a by-law which is in contravention of the terms of the charter of the corporation; and it has also been held that as an essential part of the contract rights between the members, it operates to prevent the majority from so controlling or exercising the corporate powers as to pervert or destroy the original purposes of the corporation.

§ 29. The Consideration. The consideration moving from the State to the incorporators is the privilege or right of being incorporated and acting in a corporate capacity, exercising corporate powers. The consideration moving from the incorporators to the State, as said by Justice Story in the Dartmouth College case, is the benefit and

advantage derived by the State or the public at large from the organization of the corporation and the resulting prosperity of the community. Chief Justice Marshall also said, in the same case, that the objects for which a corporation is created are universally such as a government wishes to promote. They are deemed beneficial to the country, and this benefit constitutes the consideration, and in some cases the sole consideration of the grant. In those States where substantial fees are charged for the organization of corporations, it has been suggested that the payment of these fees by the incorporators, in addition to the general benefits and advantages noted above, is to be regarded as a part of the consideration for the grant by the State to them.

§ 30. **The Dartmouth College Case.** The importance of the Dartmouth College case and its consequent result upon the law of private corporations in this country justifies some further reference to it. The charter of Dartmouth College, as originally granted by the British Crown prior to the Revolution, limited the number of trustees to twelve, conferred upon them the full power of governing the college, including the right of filling vacancies occurring in their own body, and of appointing and removing instructors. After the Revolution, the legislature of New Hampshire passed a law to amend the charter and to improve and enlarge the corporation. It increased the number of trustees to twenty-one, gave the appointment of the additional members to the executive of the State, and created a board of overseers to consist of twenty-five persons, of whom twenty-one were also to be appointed by the executive. These overseers had power to inspect and control the most important acts of the trustees. An action of *trover* was brought by the trustees of the Dartmouth College against William H. Woodward in the State courts of New Hampshire to recover the book of records, corporate seal and other corporate property to which the plaintiffs alleged themselves to be entitled. A special verdict was found for the defendant if certain acts of the legislature

of New Hampshire, those already referred to, were valid and binding on the trustees without their assent, and at the same time were not repugnant to the Constitution of the United States; otherwise the verdict was to be found for the plaintiff.

The Superior Court of Judicature of New Hampshire rendered a judgment upon this verdict for the defendant, which judgment was brought before the Supreme Court of the United States on writ of error, and the single question considered by that court was whether the acts to which the verdict referred violated the Constitution of the United States. The contention of the trustees was that the original charter or grant constituted a contract as between the sovereign State and the corporation, the obligation of which could not be impaired by subsequent legislation on the part of the State, invoking, in support of their contention, that provision of the Federal Constitution which prohibits a State from passing any law impairing the obligation of a contract. Chief Justice Marshall wrote the principal opinion and on the main question said, in the course of his decision:

“This is plainly a contract to which the donors, the trustees, and the Crown (to whose rights and obligations New Hampshire succeeds) were the original parties. It is a contract made on a valuable consideration. It is a contract for the security and disposition of property. It is a contract on the faith of which real and personal estate has been conveyed to the corporation. It is a contract then within the letter of the Constitution, and within its spirit also, unless the fact that the property is invested by the donors in trustees for the promotion of religion and education for the benefit of persons who are perpetually changing, though the objects remain the same, shall create a particular exception taking this case out of the prohibition contained in the Constitution. . . . The opinion of the court, after mature deliberation, is that this (referring to the charter) is a contract, the obligation of which cannot be impaired without violating the Constitution of the United States. This opinion appears to us to be equally supported by reason and by the former decisions of this court.”

The decision then proceeded to hold that the acts of the legislature of New Hampshire constituted an impairment of the contract obligation of the charter and were, therefore, unconstitutional as contravening the constitutional provision above referred to. Justice Miller referred^s to this decision in the following language:

“It may be well doubted whether any decision ever delivered by any court has had such a pervading operation and influence in controlling legislation as this.”

And, again, in speaking of this case, he said:

“The opinion, to which there was but one dissent, establishes the doctrine that the act of a government, whether it be by a charter of the legislature or of the Crown which creates a corporation, is a contract between the State and the corporation, and that all the essential franchises, powers and benefits conferred upon the corporation by the charter become, when accepted by it, contracts within the meaning of the clause of the Constitution referred to.”

The practical effect of this decision is to restrict the power of the State in the passage of legislation, altering, amending or repealing existing laws under which corporations have become incorporated and under authority of which they are exercising the powers, privileges or capacities already granted. Or, to state the principle differently, the charter of the corporation, for example, the source of its powers, can not be subsequently changed or repealed by the State without the consent of the corporation and the other parties to the contract contained in it.

The far-reaching effect of this decision was clearly perceived by the court, for Justice Story, in a concurring opinion, suggested that if the legal effect of their decision should be deemed against public policy, that it would be a comparatively easy matter for subsequent legislative acts granting corporate rights and charters to reserve expressly to the State the power to amend, alter, or repeal them. The doctrine of the Dartmouth College case has been widely

^s Lectures on the Constitution, 392.

criticized, but on reflection and on examination of the inherent and reserved powers of the State, it will be seen that it is correct in principle, and that as to all of the essentials of regulation and control the powers of the State are not diminished.

§ 31. Meaning of the Word Law. The word law is used in the Federal Constitution in the prohibition relating to the impairment of the obligation of contract rights, and controversy arose later in respect to its exact significance. By a series of decisions the accurate meaning of the word law as thus used is now held to include not only the acts of any lawmaking body of the State, constitutional provisions or amendments, but also decrees or judgments of a court of last resort in a State to which it gives the force and effect of a law. In other words, the term law is held to include any act of the State to which it gives the force and effect of a law.

§ 32. Inherent Power of the State to Regulate through Its Police Power. Let us consider, first, some of the inherent and inextinguishable rights of a State to control and regulate the acts of all persons and the use of property within its jurisdiction even though their exercise may affect the powers or the capacities of corporations already in existence and exercising them under previous authority from the State. The most important of these is termed the police power. This cannot be relinquished even by the express provisions of a charter so as to defeat the right of the legislature to subsequently act in respect to it, much less to operate as a restraint upon future legislative bodies. Judge Cooley declared:⁴

“That all contracts and all rights are subject to this power. And not only may regulations which affect them be established by the State, but all such regulations must be subject to change from time to time as the general well-being of the community may require or as the circumstances may change or as experience may demonstrate the necessity.”

⁴ Cooley, *Constitutional Limitations* (7th ed.) p. 833.

Definitions, or attempted definitions, have been given in many cases and by many legal authors. As an example:

“This police power of the State extends to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the state.”⁵

All agree, however, that this power of the State extends to the protection of its peace, good order, good morals, welfare, and the health, lives, and limbs of its people, and in the absence of constitutional provisions limiting the manner of its exercise, a lawmaking body may prevent all things hurtful to the safety, the welfare, and the comfort of society, even though such legislation invades the right of liberty or affects the property of individuals. This power is inherent, inextinguishable, continuing and not subject to surrender or barter.

§ 33. Restrictions upon an Exercise of the Police Power. Limitations upon the exercise of the power necessarily exist and for the purpose of this work two of the more important only will be suggested. These are, that the subject of an attempted exercise of the police power by the State must have some relation to the nature of the power; that is, some reference to the peace, health, safety, and good order or the good morals of the community; and also that the regulations adopted by a State, or any of its subordinates, in the ostensible exercise of the power must be reasonable and necessary. As said by one court:

“It is not within the power of the general assembly, under the pretense of exercising the police powers of the State to enact laws not necessary to the preservation of the life and safety of the community that will be oppressive and burdensome upon the citizens. If it should prohibit that which is harmless in itself, or command that to be done which does not tend to promote the health, safety, or welfare of society, it would be an unauthorized exercise

⁵ Thorpe v. Rutland, etc., R. R. Co. 27 Vt. 140.

of the power and it would be the duty of the courts to declare such legislation void.”⁶

In the valid exercise of the police power, therefore, the conduct of the business of a corporation, or the business itself, or the exercise of corporate powers theretofore legally granted, may be regulated and controlled by the State, though its action in this respect tends to lessen the corporate capacity, or, in some cases, to prevent it entirely from carrying on or conducting its business.

Police Power; Discussion and Illustration of Its Exercise. The existence of dual sovereignties in the United States and the fact that to the Federal Government is given certain exclusive powers, operate as a restriction upon an exercise by the States of the police power in respect to corporations. The power of the Federal Congress to pass laws regulating interstate commerce, for example, is exclusive in that body, and the several States cannot act where an attempted exercise of the police power is in effect, a regulation of interstate commerce. The States, however, possess certain exclusive powers, and there are also others which may be concurrently exercised by both the Federal Congress and the States, and the right in each sovereignty, therefore, remains unrestricted except as controlled by constitutional provisions. Corporations, equally with other persons, are subject to the proper exercise of the police power of both the Federal Government and that of the States, and this has been exercised in many cases in such a way as to diminish corporate rights previously granted or to affect the manner in which corporate business has previously been transacted, acts which, if not done under the police power, would amount to an impairment of charter privileges and, therefore, contract rights. Legislation has been passed in many instances establishing limitations upon the power of making contracts between the corporation as an employer and its employees; provisions fixing hours of labor, and especially those for women and chil-

⁶ Toledo, etc., R. R. Co. v. Jacksonville, 67 Ill. 37.

dren; requirements in respect to the filing of reports by corporations; inspection laws affecting, in many cases, the carrying on of the business of the corporation for which it was directly authorized by its charter; regulations governing the importation or transportation of diseased animals; and provisions regulating the manner in which the business of common carriers is to be conducted. The latter acts have for their especial purpose the protection and safety of travelers and other persons either employed by the corporation or those whose safety will be enhanced by reason of the regulations. The adoption of laws or municipal ordinances controlling the speed of trains in cities or at crossings or providing for the erection of safety gates; tests for color blindness for engineers, are familiar examples; and many others of a similar nature will suggest themselves to the reader. The police power of the State also extends to the control and regulation of rates for services or commodities furnished by quasi-public corporations, but this subject has been sufficiently discussed in a preceding section. Proper police regulations may even extend to the abolition of a business or occupation previously carried on by a corporation under authority of law. This principle is well illustrated in the cases of *Stone v. Mississippi*, and *Beer Company v. Massachusetts*.⁷ In the former case the court said:

“No legislature can bargain away the public health or the public morals. The people themselves cannot do it, much less their servants. The supervision of both these subjects of governmental power is continuing in its nature, and they are to be dealt with as the special exigencies of the moment require. Government is organized with a view to their preservation and cannot divest itself of the power to provide for them. For this purpose the largest legislative discretion is allowed, and the discretion cannot be parted with any more than the power itself.”

In the latter case certain malt liquors belonging to the Boston Beer company had been seized as it was transport-

⁷ 101, U. S. 814; 97, U. S. 25.

ing them to its place of business with the intent there to sell them in violation of a prohibitory liquor^s law passed subsequent to the organization of the corporation, which was created for the especial purpose of engaging in the manufacture and sale of malt liquors. The company claimed that under its charter it had the right to manufacture and sell said liquors and that the prohibitory law impaired the obligation of the contract contained in that charter and was void so far as its business and property was concerned. In passing judgment upon this point, the court said:

“The plaintiff in error was incorporated ‘for the purpose of manufacturing malt liquors in all their varieties,’ it is true; and the right to manufacture, undoubtedly, as the plaintiff’s counsel contends, included the incidental right to dispose of the liquors manufactured. But although this right or capacity was thus granted in the most unqualified form, it cannot be construed as conferring any greater or more sacred right than any citizen had to manufacture malt liquors; nor, as exempting the corporation from any control therein to which a citizen would be subject, if the interests of the community should require it. If the public safety or the public morals require the discontinuance of any manufacture or traffic, the hand of the legislature cannot be stayed from providing for its discontinuance by any incidental inconvenience which individuals or corporations may suffer. All rights are held subject to the police power of the State. We do not mean to say that property actually in existence, and in which the right of the owner has become vested, may be taken for the public good without due compensation, but we infer that the liquor in this case was not in existence when the liquor law of Massachusetts was passed. . . . The plaintiff in error boldly takes the ground that being a corporation it has a right by contract to manufacture and sell beer forever, notwithstanding and in spite of any exigencies which may occur in the morals or the health of the community, requiring such manufacture to cease. We do not so understand the rights of the plaintiff. The legislature had no power to confer any such rights.”

^s 97, U. S. 25.

This same idea is also expressed in the Stone case previously cited, where the court said that in passing upon the question of whether a law had been passed impairing the obligation of a contract, the first query of the court would be to ascertain whether any contract existed and it was then held that the State could make no contracts surrendering or limiting its right at any time to exercise its police power.

§ 34. Eminent Domain. The inherent continuing and inextinguishable power of eminent domain possessed by all sovereignties also in its exercise may operate as a regulation or control of corporations despite the contract doctrine of the Dartmouth College case. This power is one which gives to the State or its delegated agencies the right to appropriate or take private property for a public use upon the payment of just compensation. The courts hold, however, that the compensation secured by constitutional provisions providing for the exercise of the power must be full, ample, just and complete. The property of corporations, equally with that of natural persons, is subject to the exercise of this power, and it has been suggested in some cases that even the franchises of the corporation may be taken for a public use upon the payment of just compensation.

§ 35. Taxation. The power of the State to compel the payment of an equivalent contribution from persons and property within its jurisdiction for its support is also one of the continuing, inherent and inextinguishable prerogatives or powers of sovereignty, and unless there exists a valid exemption as to corporations or their property from taxation, or a limitation upon the amount which can be collected, the state can exercise freely, subject only to constitutional provisions, this power in respect to the properties of private corporations. As a theory, this power is without limitations, but in the United States, the Constitutions both of the United States and of the several States contain provisions which, in effect, limit and restrict its exercise. These limitations apply to the property of pri-

vate corporations equally with that belonging to other persons. A few of the more important may be suggested. In the first place, the power can only be exercised for what is known as a public purpose. The State cannot use its power of taxation for the purpose of taking property from one citizen to be given to another. The use of the moneys obtained by taxation is limited to governmental purposes or objects. A State is also restricted in the exercise of its power of taxation to persons or property within its jurisdiction. This principle is axiomatic. The laws or the powers of the sovereign can extend no farther than its geographical limits. The property, therefore, of a corporation, unless within the jurisdiction of the State, cannot be taxed. The principles of uniformity and equality must also be applied by the State in respect to the taxation of the property of corporations.

It has already been suggested that in this country exist dual sovereignties, the United States of America and the several States. The Federal Constitution gives to the United States certain prohibitive powers over the sovereign acts of the different States. A few may be mentioned: a State cannot pass any law impairing the obligation of a contract. It must give to each citizen the equal protection of its laws. It cannot deprive any person of life, liberty or property without due process of law. Private property cannot be taken for a public use without the payment of just compensation; a State cannot make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. The power of the States over corporations created under the Federal laws is limited in all respects and this is especially true of those corporations organized by the Federal Government as agencies of its own in carrying out or executing some of the powers directly given to it in the Federal Constitution. The banks organized under the National Banking Laws are good illustrations of the latter class of corporations.

§ 36. Reservation of Right to Amend, Alter, or Repeal.
It has already been noted that Justice Story, in the Dart-

mouth College case, suggested that the States might, in the passage of laws providing for the creation of corporations, reserve directly the right to amend, alter, or repeal them. The States, without exception, have followed this suggestion. The legal effect of such a reservation is to make the power of the State in respect to amendment, repeal or change, a part of the charter and its resulting contract. Subsequent legislatures, therefore, can change, repeal or alter laws relating to the incorporation and organization of corporations and the conduct of their business without the contention being raised that this action is tantamount to an impairment of the contract obligation and therefore unconstitutional under the well known provision of the Federal constitution.

The possession of this power to amend, alter, or repeal by the State, however, does not give to it, as might be gathered from the phraseology, the unlimited and unrestricted power to deal with corporations and their property. Some well established principles construing the right to amend, alter, or repeal will be noted in the following section.

§ 37. Limitations upon the Reserved Right to Alter, Amend, or Repeal. Where the State has expressly reserved the right to repeal the charter of a corporation at that time granted it, no question can be raised if subsequently the power of repeal is exercised. To expressly reserve the right to repeal, and then to withhold from the legislature the legal right of exercising the power directly reserved would be an absurdity. It can be no breach of a contract to enforce its terms. Where the power to amend is alone given, the courts hold that this is not equivalent to the power of repeal; that a new charter cannot be forced upon a corporation through the power of amendment, nor can an existing charter be taken away; and, further, that the State cannot compel the corporation to do business under an amendment. The power to amend is limited to action in consonance with the general powers and capacities of the corporation as originally created. Where the power to

alter, amend, or repeal has been reserved, the question presents greater difficulties. Thompson on Corporations⁹ summarizes the authority and the powers of the State under these circumstances as follows:

“However, in such case the corporation is entitled to some protection. On reason and authority the corporation is entitled to protection as against any amendment or repeal under such reserved right: (a) that would amount to a confiscation of property; (b) that would defeat or substantially impair the object of the original grant; (c) that would force the corporation into enterprises not contemplated by the original charter; (d) that would deprive incorporators of the control of the corporate property; (e) that would authorize a disturbance of vested rights; (f) that would take from the corporation its funds or property without compensation or due process of law; (g) that would annul or dissolve contracts already executed; (h) that would amount to punishment for acts lawful when committed; (i) that would affect or change the rights of the stockholders as among themselves; (j) that would extend to giving a power to one part of the corporators as against the other which they did not have before; (k) that would abridge the lawful rights of the stockholders. These principles are also supported by the leading law-writers.”

It must be remembered that in connection with the possession of the power on the part of the State to alter, amend, or repeal, fundamental rights stated in the Constitution of the United States or the constitutions of the different States operate as a limitation. These basic principles, the application of which is extended not only to personal but also to property rights, are designed for the protection of artificial persons or corporations equally with individuals. At the present time, when the inclination exists, even on the part of well meaning executive officials of high station as well as members of legislative bodies, to forget or ignore the paramount and organic law, viz, our constitutions, it might be well to call attention to some provisions having for their purpose the objects above sug-

⁹ Thompson on Corporations, 2d ed., § 341.

gested. No person, including a private corporation, shall be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. Under these provisions, as well as others, the courts have decided that even where the power is reserved to alter, amend, or repeal the charters of private corporations a State cannot so legislate as to destroy or impair contract rights, either of the corporation or of its members, previously acquired in the lawful exercise of its corporate powers. That they cannot so legislate as to effect an injustice to the members of a corporation; that the contractual rights of members, as among themselves, cannot be destroyed or impaired, and that under all circumstances and on all occasions no action can be taken by the State which will destroy or lose to the corporation and its members the property of the corporation. Amendments to the charter cannot be forced upon a corporation. This principle obtains because the organization of a private corporation is the result of purely voluntary action on the part of its members. The State cannot compel a group of persons to organize and conduct a private business enterprise under a corporate form. It is within the privileges of a corporation, where a radical amendment has been passed, to wind up its affairs. Rights acquired by the corporation and which are not included within the contract terms of the grant cannot be made the subject of amendatory legislation. "Personal and real property acquired by the corporation during its lawful existence, rights of contract or choses in action so acquired and which do not in their nature depend upon the general powers conferred by the charter, are not destroyed by such a repeal."¹⁰

¹⁰ *Greenwood v. Freight Company*, 105 U. S. 13.

The Supreme Court of the United States, in another case,¹¹ held:

“All agree that it cannot be used (referring to the power to alter, amend, or repeal) to take away property already acquired under the operation of the charter or to deprive the corporation of the fruits actually reduced to possession of contracts lawfully made.”

And again this court said, in another case:

“The power reserved to the legislature to alter, amend, or repeal a charter authorizes it to make any alteration or amendment of a charter granted subject to it which will not defeat or substantially impair the object of the grant or any rights vested under it and which the legislature may deem necessary to secure either that object or any public right.”

The term law as used in the contract obligation clause of the Federal Constitution has already been defined as including the act of any law-making body of a State. Municipal corporations are frequently created by State authority and a portion of its legislative power delegated to subordinate legislative bodies known as municipal councils, or some equivalent term. The protection of the Federal Constitution applies to the legislative acts of these subordinate law-making bodies equally with the action of a State legislature, and the principles in respect to the protection of property and vested rights, briefly stated in this and the preceding paragraph, also refer to the legislative acts of municipalities.

§ 38. The Charter of a Corporation: Its Construction. The charter of a corporation is the source of its powers; the fountain of its legal authority to act in its corporate capacity. The charter, as will be remembered, includes not only the articles of incorporation, as executed by the incorporators, but also general laws and constitutional provisions referring to the particular class or kind of corporation. Owing to the diverse character and qualifications of

¹¹ Union Pacific R. R. Co. v. United States, 99 U. S. 700.

the members of the legislative bodies, it is natural that at times, language ambiguous and indefinite in its character may be found in grants to corporations, or laws under which they may be created and corporate powers exercised. The occasion, therefore, frequently arises for a construction and interpretation of the charter of the corporation. Rights and privileges may be claimed and their existence denied. It is then the duty of the courts to pass upon conflicting claims. What rules of interpretation are adopted by them in the determination of these issues? It might be said that generally the courts, where the question is raised of the meaning of a word or phrase, the existence of alleged conditions or the application of particular laws, follow either the rule of strict or of liberal interpretation or construction. Where the former is adopted, the existence of the right or the application of the law is decided in favor of the doubt. If the rule of strict interpretation is adhered to, the doubt is resolved against the existence of the right or condition or the application of the law.

The organization of corporations and the conduct of their business is not only made legal by the State but is encouraged as a matter of public policy because of the resulting benefit and advantage to the community. The grant of corporate power may be either the authorization to transact a business or to carry on an occupation under corporate form which natural persons as a matter of common right could engage in or carry on. On the other hand, powers or capacities may be granted to a private corporation which are exclusive in their character,¹² or exemptions and special privileges may be granted to them to possess and to enjoy which the citizens of the country, as a matter of common right, are not entitled to possess or enjoy. Stating the proposition more concisely, corporations may enjoy and possess either rights of an ordinary and natural character, or special privileges and exemptions not existing as a matter of common right, nor without a special grant of the State. Because of the favorable attitude of the State to-

¹² *Close v. Glenwood Cemetery*, 107 U. S. 466.

wards corporations, the courts generally adopt, in the interpretation of a charter, the liberal rule in respect to the exercise of all the ordinary and usual powers of the corporation. That rule of construction is also followed which tends to facilitate the carrying on of the corporate business and the success of the enterprise, if there is not involved a doubt as to the existence of a special privilege or exemption. The rule of strict construction, on the other hand, is universally applied in connection with the exercise of exclusive privileges, franchises, and exemptions. Where a grant to a corporation is made in derogation of the common right, as the phrase is sometimes stated, if any doubt exists as to its existence, or the extent of its application, or the manner in which it can be exercised, that doubt is resolved most strongly against the corporation and in favor of the State.

Since the charter of a corporation consists largely of the acts of law-making bodies, the rules or canons of construction usually applying to legislative acts will also be applied to that legislation referring to and affecting private corporations. One canon or rule of construction is that the intent of the legislature is to be ascertained if possible in cases of doubt as to the meaning of words or phrases or the existence of a right. General words, followed by specific enumeration, are limited in their meaning to the rights or powers conveyed or included in the words of narrower or restricted meaning. The doctrine of exclusion, so-called, is also frequently applied and followed by the courts in determining the extent of corporate powers.

§ 39. Construction of Charters: Strict and Liberal Rules. From an examination of the authorities it will be easily ascertained that corporations exercise, under their charters, two classes or kinds of corporate power, viz, those which might be termed as the usual and ordinary acts essential to the transaction of their business as corporations and others involving the exercise of the rights granted by the State of an extraordinary or exclusive nature. The liberal rule is undoubtedly adopted by the courts in construing and applying the former, while, with-

out exception, the strict rule is followed in determining corporate rights of the latter class. Phrases and decisions are constantly found to the effect that the charter of a corporation is to be strictly construed as against it and in favor of the public; that nothing can pass by implication and that no corporate capacities can be exercised unless they are clearly and unequivocally expressed. Upon examination of the cases, it will be found that these principles, in their severity, apply to special privileges, powers, or exemptions claimed by the corporation. There will be found also decisions holding that the strict rule of construction applies to all the powers or capacities claimed by the corporation, but the weight of authority as gathered from the more recent decisions without doubt holds along the lines suggested. This modern rule is, clearly, the correct one, and is well stated in Thompson on Corporations:¹³

“Ordinarily the interpretation is not to be opposed to the general purposes of the grant, except where the restrictive language of the charter itself is such that it cannot be overlooked or disregarded. On this theory of interpretation, statutes, and charters are permitted to include devices, instrumentalities and methods of conducting business unknown and not in use at the time of the adoption of such charter. This rule of progressive construction permits corporations to keep pace with the progress made in inventions and appliances, and extends jurisdiction to protect plans and methods of transacting business which were not known and could not have been stated in the charter at the time it was granted.”

In a Pennsylvania case it was stated:¹⁴

“It is doubtless true that such charters are to be construed most beneficially for the public and most strictly against the company, but the construction must be a reasonable one. The charters of most private corporations are for purposes of private gain, and many of them grant exclusive privileges in abridgement of individual rights,

¹³ Thompson on Corporations, 2d ed., § 309.

¹⁴ Brown v. Susquehanna Boom Co. 109 Pa. St. 57.

but as they are intended to subserve public interests they should be so construed as not to defeat the purpose of their creation. . . . Whilst, therefore, the words of the charter should be construed with some degree of strictness for public protection, it should not be construed to require the performance of what, in the nature of the case, cannot be performed."

The liberal rule of construction, it will be found also, upon an examination of the cases, to be applied with less frequency in the case of quasi-public corporations. This principle further illustrates the distinction attempted to be made above in the nature or character of the powers exercised by the corporation. The liberal rule is also used where the corporation is seeking to avoid a liability through a strict or technical construction of its charter. The subject of the construction of the charter is so intimately connected with the exercise of its powers that a further discussion will be had of the principles followed in the chapter on corporate powers. Thompson on Corporations¹⁵ states as a few fundamental rules, which apply to the interpretation of charters, the following:

"(a) Charters are to be construed as contracts between the government and the corporation and not as mere laws; (b) Charters are to receive a reasonable construction, and if the intent can be satisfactorily made out from the express words, and from the just and plain inference from the terms used, it is to prevail and to be carried into effect; (c) If the language of the charter be ambiguous, or the intent cannot be satisfactorily made out from the terms used, then it is to be taken most strongly against the corporation and most beneficially to the public; (d) A right not given in express words by the charter may be deduced by interpretation, if it is clearly inferable from some of its provisions."

And another rule was given by Lord Coke:¹⁶

"The best exposition of the king's charter is, upon the consideration of whole charter, to expound the charter by

¹⁵ Thompson on Corporations, 2d ed., § 297.

¹⁶ Sutton Hospital Case, 10 Coke 1.

the charter itself, every material part thereof being explained according to the true and genuine sense, which is the best method."

§ 40. Franchises and Privileges. In a more extended work this subject would receive extended and separate treatment. In this elementary treatise, a discussion naturally falls under the chapter on the State and the corporation, and must necessarily be limited to a few sections. It will be somewhat difficult to state in the space assigned in a concise and strictly accurate manner the essential questions involved. This difficulty arises both from the nature of the subject and also from the different conceptions of it by judges and lawmakers. The definition most frequently given of a franchise is that of Chief Justice Taney in a case in 1839,¹⁷ where he defines franchises as

"Special privileges conferred by government upon individuals and which do not belong to the citizens of the country generally of common right. It is essential to the character of the franchise that it should be a grant from the sovereign authority, and in this country no franchise can be held which is not derived from the law of the state."

The authorities are generally agreed that the term can be used in a primary and secondary sense. The right of an incorporated company "to be a corporation, or the right conferred upon it by the State to be an artificial body, has been called its primary franchise, and this has been distinguished from what is termed its secondary franchises which include the right to carry on or transact a particular kind of business as in the case of the privileges granted to a water company with the right to take tolls, etc., or the right of a railroad to collect fares or of a toll road company to exact toll for services performed."¹⁸

This distinction is an essential one to bear in mind in connection with the right of the State to regulate or control the corporation, to amend, alter, or repeal its char-

¹⁷ *Bank of Augusta v. Earle*, 13 Peters (U. S.) 519.

¹⁸ *Joyce on Franchises* § 8.

ter, or to determine the extent of the capacities enjoyed by a particular corporation. A clear distinction exists between the grants of franchises which are essential to the creation and the continued existence of the corporation, to its right as a distinct legal entity, and other privileges or powers given to it that are not essential or prerequisite to its corporate existence. The purposes of corporate existence are quite distinct from the franchises of the corporation. A franchise to be a corporation is distinct from a franchise as a corporation to maintain and operate a railway.

In the *Chicago City Railways*¹⁹ case, the Supreme Court of the United States held that the franchise of existing as a corporation was given by the State and was distinct and separate from the privilege or license given by the city of Chicago to the corporation to operate and maintain a system of street railways upon its highways. In another case,²⁰ this distinction is also emphasized:

“This corporate franchise, viz, the franchise to be and exist as a corporation for the purposes specified in the articles of incorporation, appertains to every corporation, for whatever purpose it may be formed, and there is no distinction in this regard between the banking or grocery corporation, and the railroad, water, or gas corporation. The right to engage in every such business is open to all citizens, independent of any grant from the sovereign, but it is available to no one to conduct any such business through the agency of a corporation without such grant. Certain occupations are, however, of such a nature that various privileges conferable only by the sovereign power are convenient, and in most cases absolutely essential, to the successful maintenance of the business to be carried on, whether it be carried on by a corporation or by an individual, such, for instance, as the right to use public highways. Such rights and privileges are also known as franchises, but they constitute a class entirely distinct from and independent of the corporate franchise.”

The distinction is practically applied where the existence of the power to exercise certain rights is at issue.

¹⁹ *Blair v. Chicago*, 201 U. S. 400-460, 50 Law ed. 801.

²⁰ *Bank of California v. San Francisco*, 142 Calif. 276.

Where franchises, as the word is used in its secondary sense, are claimed, the rule of strict construction undoubtedly exists; while the liberal rule would be followed in respect to the exercise of franchises which belong to the first class, or where the word is used in its primary sense.

§ 41. Exclusive Franchises. All franchises granted may be of an exclusive character or otherwise. The word exclusive as used in this connection is self-definitive. The right or privilege to exist as a corporation for a specified purpose, or of exercising certain corporate capacities or powers is given by the State to a group of persons to be exclusively exercised or possessed by them in a corporate capacity. An exclusive grant of this character is regarded as a contract, and if the State attempts to give to other persons the same or equivalent rights this act will be regarded as an impairment of the contract obligation. On the other hand, if certain corporate rights and capacities are granted with no words expressly stating their character as exclusive, the State, undoubtedly, is not limited in its power to grant to other corporations like privilege and capacities.

§ 42. Nature of Franchise. A franchise, whether the word is used in its primary or secondary sense, is usually regarded as a contract right, controlled by the principles already stated. The permission of the State or of a subordinate agency, viz; a municipal corporation, to exercise a corporate power or to conduct a business, the legal authority to do which has been already granted by the State, is considered by the courts usually as a mere license or the grant of a privilege which may or may not be legally regarded as a contract. Its nature in this respect will be determined by the language of the grant. The license may be merely a revocable privilege. There are many illustrations of franchises, privileges, or licenses granted to corporations in modern times. The right to exercise the power of eminent domain by railroad corporations; to establish ferries or bridges; to construct and maintain systems of street railways within the limits of municipalities; to establish and maintain plants for the manufacture or supply

of water, light, or power. The right of the State or of the municipality as a subordinate agency of the State to repeal or to alter the terms of the franchise, privilege, or license given, as already suggested, will depend entirely upon the language of the original grant, and whether, under the rule of strict construction, it will be held a contract or merely a revocable license.

§ 43. **Assignability.** Whether a franchise or license granted by State or other lawful authority to a corporation can be assigned and transferred by it to some other group of persons depends largely upon the existence of two conditions. First, can this be done under the language of the grant? In cases of doubt, the rule of strict construction applies. Second, what is the nature of the business to be carried on under the franchise or privilege granted. If it is that usually conducted or carried on by what are known as quasi-public corporations, unless the right to sell, transfer, or assign clearly appears in express terms, it will be denied. This principle of law is based upon the reason that in the grant of these powers to particular corporations a certain degree of confidence is reposed in them in respect to the performance of not only their powers and corporate capacities, but also their duties to the public or community at large. Quasi-public corporations, it will be remembered, are private corporations, but engaged in a business which affects the welfare of the public at large. The State, in the grant of a franchise or privilege to a quasi-public corporation, may consider it inadvisable or against public policy that the rights conferred should be sold or assigned to others lest the full and proper performance of their duties and obligations to the public be impaired or destroyed. A familiar illustration of this principle is to be found in many statutory provisions that prohibit the sale, transfer, or mortgaging of the franchises (using the word in its secondary sense) of a common carrier.

The sale or transfer of the property of a railroad company, which also may be effected through the mortgaging of its franchises, might result in the destruction of bene-

ficial competition existing between several common carriers. The properties and franchises, if a sale or transfer were permitted, might be acquired by one railroad corporation and others, the charters of which had been granted for the purpose of protecting the public against extortion or discrimination, absorbed. The power to sell, transfer, or assign franchises or privileges must be expressly given.

§ 44. Constitutional Protection of Franchises or Privileges. Franchises or privileges, when granted by the State or under its authority constituting a contract as between the grantor and the corporation, will be protected by that clause of the Federal Constitution in respect to the impairment of contract obligations. Constitutional protection will depend entirely upon the language of the grant or franchise. If the privileges are construed as being merely revocable, clearly no contract relation will exist.

CHAPTER VI

TAXATION OF CORPORATIONS

§ 45. Definition and Nature of the Power. It was stated in a preceding section that in the absence of an express exemption, the property of a corporation was subject to the taxing power of the State as one of its inherent and sovereign attributes. The exercise of the power, unless as above stated specifically withheld, does not constitute an impairment of any charter or contract obligation by the State. The power to tax can be exercised both as a regulative measure and also as a source of revenue to the State. The power has been defined as that inherent and continuing power of a State to compel the payment from persons and upon property within its jurisdiction of an involuntary contribution for the maintenance of its organized government. Another definition given by the Supreme Court of the United States¹ is to the effect "that taxes are burdens or charges imposed by the legislative power upon persons or property to raise money for public purposes. The power to tax rests upon necessity as inherent in every sovereignty. The legislature of every free State will possess it under the general grant of legislative power, whether particularly specified in the Constitution among the powers to be exercised by it or not."

And Judge Cooley, in his work on Constitutional Limitations, states both a definition and some inherent limitations upon an exercise of the power in the following language:

"While taxation is in general necessary for the support of government, it is not part of the government itself. Government was not organized for the purpose of taxation, but taxation may be necessary for the purposes of government.

¹ *Ashley v. Ryan*, 153 U. S. 436.

As such, taxation becomes an incident to the exercise of the legitimate functions of government but nothing more. No government dependent upon taxation for support can bargain away its whole power of taxation, for that would be, substantially, abdication. All that has been determined thus far is that for a consideration it may, in the exercise of a reasonable discretion and for the public good, surrender a part of its powers in this particular."

§ 46. Corporate Property Subject to Taxation. In the case of *Tennessee v. Whitworth*,² it was held by the Supreme Court of the United States, Chief Justice Waite writing the opinion, that

"In corporations four elements of taxable value are sometimes found: (1) franchises; (2) capital stock in the hands of the corporation; (3) corporate property; (4) shares of the capital stock in the hands of the individual stockholders. Each of these is recognized as an element of a taxable value in a corporation that, subject to constitutional restrictions, can be taxed by the State."

The franchises of the corporation, it has been held in many States, are subject to a separate tax in addition to one on its property of a tangible value or the capital stock of the corporation in the hands of the stockholders or considered as the capital stock of the corporation. The franchises subject to taxation may be the rights and privileges included within the meaning of that word, used either in its primary or secondary sense, the primary meaning being, as previously stated, the right of being a corporation and the exercise of certain ordinary privileges in connection with its existence in a corporate capacity; and, in a secondary sense, the grant of special privileges and exemptions or extraordinary powers not possessed by the people as a matter of common right, or, in some cases, in derogation of common right.

The right of the State to tax the tangible property of a corporation obtains as a matter of course, the only limita-

² 117, U. S. 129.

tions being those contained in its own Constitution or that of the United States and which will be noted in a succeeding section. Some States have held that the capital stock of a corporation considered as capital stock is subject to taxation independently of the right to levy a tax upon the other elements of taxable value found in a corporation, or upon its stock considered as the personal property of the corporate stockholders.

Shares of stock in the hands of their owners are considered personal property, and as such subject to taxation by the State. A tax upon shares of stock of the corporation may be effected either through an assessment of the property in the hands of the shareholders, or the corporation itself may be compelled to pay the tax and collect it from the stockholders by deducting it from its net profits or dividends. In some States are to be found constitutional prohibitions against double taxation, and it is a serious question whether the taxation of the capital stock in the hands of the stockholders, and also as an arbitrary item of taxable value belonging to the corporation does not constitute double taxation. The weight of authority so regards it. Where no constitutional provision prevents double taxation this is possible, although the courts always construe laws, if possible, so as to prevent it.

§ 47. Methods of Taxation. The four elements of taxable value in a corporation were stated in a preceding section. The methods employed in taxing either one or all of these vary in the different States. Where, by statute, the franchises of the corporation are taxed, some procedure is also provided for the establishment of their value. It might be suggested that where the franchises of a corporation, whether the term is used in its primary or secondary sense, are by statute made elements of taxable value and taxed, in proceedings to ascertain the value of the property invested in a plant for the determination of the question of a reasonable charge made by that corporation for services, a value of the franchises at least equivalent to the taxable value should be included as a part of the capital or the

property invested. A distinction is made by the courts between the taxation of franchises and the levy of a tax on the capital stock of a corporation. The taxation of both has been held not to constitute double taxation.

Various methods are employed to determine the value of the capital stock of a corporation for the purposes of taxation. The reader is referred, for illustration, to the statutes of his own State. In some instances, a tax is levied upon the par value of the stock; in other cases, upon the market value at the time its assessed value is ascertained. In still others, the tax is levied upon the amount of the capital stock named in the articles of incorporation. In some States the capital stock of different corporations is classified and assessed according to the dividends paid, a greater taxable value being placed upon the stock of corporations paying the larger dividends.

The tangible value of the property of a corporation is ascertained according to the methods provided by statute and varies, naturally, in the different States. The total amount subject to taxation is fixed at the value of the property less, in some cases, the property exempt from taxation, property otherwise taxed, and, in many cases, the tangible value of the property less the debts of the corporation. Instead of taxing the actual tangible property of a corporation, this result is often accomplished through the taxation of the dividends, the gross receipts, or the net earnings or profits of the corporation. The reader is referred to the statutes of a particular State for the details establishing the methods and procedure followed by that State in the taxation of corporate property.

The shares of capital stock in the hands of the stockholders is distinguished from the capital stock of the corporation and is subject to taxation as their personal property, even where the tangible property of the corporation has already paid a corporate tax, and, perhaps in addition a tax has been levied and collected upon the capital stock of the corporation in its own hands. Some States, however, provide an exemption from taxation of the shares

of capital stock owned by a private individual residing within the State where these shares of stock constitute a part of the capital stock of a domestic corporation.

§ 48. Limitations Upon the Power of Taxation. While, as a matter of theory, the State can exercise its powers of taxation without limit in this country, as said by Judge Cooley: "Government was not organized for the purpose of taxation." Limitations upon an exercise of the power are to be found in both the Federal and State Constitutions. The agencies of the Federal Government are exempt from taxation by the State. Chief Justice Marshall, in *McCulloch v. Maryland*,⁸ held that the power to tax was the power to destroy, and that if the right of a State to tax agencies of the Federal Government was conceded, it would be possible for the States to impair the efficiency and even to destroy the sovereignty of the Federal Government. The converse of the rule also is true, and the courts have held that it is without the power of the Federal Government to tax the agencies of the separate States employed by them in the exercise of their governmental functions or duties. This rule is stated here for the reason that in some instances the agencies of both the Federal and the State governments have been corporations. National banks organized under the present national banking law are, in respect to the issue of currency, regarded as agencies of the Federal Government, for to the United States is given by the Constitution the sole power of coining money and the States are prohibited from emitting bills of credit. Bonds or other securities issued by the Federal Government are clearly beyond reach of the taxing power of the States.

The provisions of the Federal Constitution with reference to the taking of property without due process of law; the appropriation of private property for a public use without the payment of just compensation; the equal protection of the laws; and the impairment of a contract obligation have all been held by the United States Supreme Court as limitations upon the taxing power of the State where an

⁸ 4 Wheaton 316.

attempted exercise of that power results in a violation of these constitutional provisions. The Federal Constitution also provides that "no State, without the consent of Congress, shall lay any impost or duties on imports or exports, except what shall be absolutely necessary for executing its inspection laws". Private corporations and their property have been repeatedly held to be persons and within the meaning of these constitutional prohibitions and protective limitations. The courts have held, however, that the States may discriminate in the exercise of their taxing powers between domestic and foreign corporations without acting in contravention of the provisions named above.

Further Limitations Upon the Power to Tax. Several limitations operating both as against the Federal Government and the different States have been stated in the preceding section. There are others of sufficient importance to justify a reference to them in even an elementary work on the subject of private corporations. The taxing power of the United States is derived from direct grants in the Federal Constitution. The taxing power of each of the different States is limited by the prohibitions contained in the Federal Constitution and also such restrictions as may be found in their own constitutions. By the Federal Constitution, the exclusive power is given to the Federal Government of regulating interstate commerce, and it has been repeatedly held that the State may, in an attempted exercise of its taxing power, effect a regulation of interstate commerce, and this action on the part of the State will be, therefore, held unconstitutional.

The usual corporate agencies engaged in interstate commerce are common carriers, telegraph, telephone, and express companies. In respect to the business of an interstate character transacted by these corporations, as well as others, they are all regarded as instrumentalities of commerce and subject to the exclusive control and regulation of Congress. Taxes of a general nature, license or franchise fees, cannot be imposed, where the result amounts to a regulation of their interstate business. The principle

is sufficiently illustrated by a recent case in the Supreme Court of the United States.⁴ A statute of Kansas provided, among other things, that before a corporation of another State, even one engaged in interstate business, should have authority to do local business in Kansas, it should pay for the benefit of the permanent school fund a charter fee upon its entire capital stock at a prescribed rate. The Western Union Telegraph Company, a New York corporation, engaged in commerce among the States and in foreign countries, had a capital stock of \$100,000,000. It refused to pay the required fee and thereupon the State brought a suit in one of its own courts against the telegraph company and sought a decree ousting and restraining the company from doing any local business in Kansas. The State court gave the relief asked for.⁵ The Supreme Court of the United States, however, reversed the judgment of the State court, and held upon the question above involved that the rule, that a State court may exclude foreign corporations from its limits, or impose such terms and conditions upon their doing business therein as it deems consistent with public policy, does not apply to foreign corporations engaged in interstate commerce, and the requirement that the telegraph company pay a given per cent of all its capital, representing all its business, interests, and property everywhere within and outside of the State, operated as a burden and tax on the interstate business of the company, as well as a tax on its property beyond the limits of the State which it could not tax consistently with the due process of law enjoined by the fourteenth amendment. The court also held that the right to carry on interstate commerce was not a privilege granted by the States, but a constitutional right of every citizen of the United States, and that Congress alone could limit the right of corporations to engage therein. And that the disavowal by a State enacting a regulation, of intent to burden or regulate inter-

⁴ *Western Union Telegraph Company v. State of Kansas ex rel*, 216 U. S., 1, decided Jan. 17, 1910.

⁵ 75 Kansas, 609.

state commerce, could not conclude the question of fact of whether a burden was actually imposed thereby; and that whatever the purpose of a statute, it is unconstitutional if, when reasonably interpreted, it does directly or by necessary operation burden interstate commerce. And, further, that in determining whether a statute does or does not burden interstate commerce, the court would look beyond mere form and consider the substance of things.

§ 49. State Taxation of National Banks. National banks are created solely under and by virtue of the laws of the Federal Government and have, as one of the express objects of their creation, the emitting of bills of credit; the States, by the Federal Constitution, are prohibited from exercising this power. They are to be regarded, therefore, as agencies of the Federal Government in respect to which the States cannot exercise their taxing powers. Congress, however, conferred upon the States, by Act of Congress of June 3, 1864, the power to tax National Banks subject to the limitations contained in that act. The phraseology of the prohibition is:

“But the legislature of each State may determine and direct the manner and place of taxing all the shares of the National Banking Associations located within the State, subject only to the two restrictions that the taxation shall not be at a greater rate than is assessed upon their moneyed capital in the hands of individual citizens of such State, and that the shares of any National Banking Association owned by non-residents of any State shall be taxed in the city or town where the bank is located and not elsewhere. Nothing herein shall be construed to exempt the real property of associations from either State, county or municipal taxes to the same extent, according to its value, as other real property is taxed.”

The phrase employed in this act, “moneyed capital in the hands of individual citizens,” has been subject of judicial construction, notably and necessarily so by the Supreme Court of the United States.⁶ The test of the validity

⁶ *Davenport Bank v. Board, etc.*, 123 U. S. 83.

of the tax levied by a State upon the property of a National Bank, is whether it materially and injuriously discriminates against the shareholders of National Banks. If this is the effect of an exercise of the taxing power of the State, that act is clearly unconstitutional.

§ 50. Property Subject to Taxation Must Be Within Jurisdiction of Taxing Power. It is an elementary and axiomatic principle that a tax, to be valid, can only be levied upon the property of an individual or of a corporation, within the jurisdiction of the taxing power. The laws of no sovereign have any extra-territorial effect. Personal property, in respect to the exercise of the power of taxation, is subject to the law of the owner's domicil, although, in recent years, as to the personal property of a corporation or its shares of stock, this rule has partly yielded to what some courts term the *lex situs* rule; that is, the law of the place where the property is kept and used. The shares of stock of the corporation may, therefore, be taxed at the place of the domicil of the corporation without reference to the residence of the owner. The personal property of corporations engaged in interstate commerce and used in a State other than that of its creation may be taxed by the State where it is so used. In a case in the Supreme Court of the United States,⁷ it was held that the method of taxation adopted by the State of Pennsylvania was an equitable one which took as the basis of assessment such proportion of the capital stock of the company as the number of miles over which it ran cars in the State bore to the whole number of miles in that and other States over which it ran. The court said:

"This was a just and equitable method of assessment and if it were adopted by all the States through which these cars run, the company would be assessed upon the whole value of its capital stock and no more."

§ 51. Exemptions from Taxation. The State or its subordinate agencies, when acting under lawful authority, may

⁷ Pullman Palace Car Company v. Penn., 141 U. S. 18.

grant a corporation, either at or subsequent to the time of its incorporation, an exemption of its property from taxation either for a limited time or as to specific portions of it. A grant of this character, if made for a consideration, is usually regarded by the courts as a contract and its obligation is protected by that provision of the Federal Constitution relative to the impairment of contract obligations. Privileges or exemptions of this nature are subject, however, to the rule of strict construction against the grantee, and unless the exemption claimed clearly appears its existence will be denied. A relinquishment or abdication of the taxing power of the State is never to be presumed. The power of taxation is exercised by the State, not only in the levy of general taxes, so termed, and the imposition of license fees as a source of revenue, but also in the collection of a certain form of tax known as a special or local assessment. This is a specific tax levied upon property for the construction of a local improvement, the paving of a street, for example, and the basis of its legality is the reception by the property taxed of a special benefit or advantage equal to the tax imposed. A good illustration of the application of the rule of strict construction will be found in the principle followed by the courts, that a general exemption from taxation of the property of the corporation does not include a release from the payment of special taxes. The property of the corporation, unless exempt for other reasons, will still be subject to the payment of local assessments, or improvement taxes as they are sometimes termed.

PRIVATE CORPORATIONS

PART II

CHAPTER VII

CORPORATE POWERS

The term power, as used in connection with corporations, has a somewhat technical significance. In the legal sense the word power, as applied to private corporations, does not mean their ability to act through their various agents, but rather their legal right and authority to so act. It is possible for a corporation to do an act which is in excess of or beyond its powers as the term is properly used. Such an act is said to be *ultra vires* (beyond its powers) and this subject will be treated in the following chapter. A corporation is an artificial and judicial person possessing powers and capacities different from those of its members. In order that an artificial person exist, some affirmative act, or its equivalent, of the State is necessary. It is a creature of granted powers unlike a natural person who can exercise powers given to all. A natural person can do all the acts, for he has the capacity, except those prohibited by law. A corporation, on the other hand, can only exercise such powers or capacities as may be given in its charter and which are the result of the grant by the State. It can only exercise such powers, using the word in its proper sense, as are conferred upon it by the sovereign, either by express grant or through necessary implication, and in general it can be said that its implied powers are those which are incidental to its very existence, or those which are necessary and proper for carrying out

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the purposes of its creation. In determining whether a corporation has overstepped its legal powers, two theories or principles are followed by the courts in England and in this country. They are known sometimes as the theory or principle of general capacity and that of special capacities. The rule generally adopted in England is that of general capacity. In Pollock on Contracts, page 119, this doctrine is stated in the following language:

“A corporation once constituted has all such powers and capacities of a natural person as in the nature of things can be exercised by an artificial person. Transactions entered into with apparent authority in the name of the corporation are presumably valid and binding, and are invalid only if it can be shown that the legislature has expressly, or by necessary implication, deprived the corporation of the power it naturally would have of entering into them. The question is, therefore, was the corporation forbidden to bind itself by this transaction.”

In *Ashbury Railroad Company v. Riche*, L. R. 7, H. L. 653, the following modification of this rule was made:

“Where there is an Act of Parliament creating a corporation for a particular purpose and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken as prohibited.”

The rule of general capacity, stated by Pollock, with the subsequent modification, is generally adopted in England.

In this country, in the Federal courts, the rule or doctrine of special capacities is generally followed, and that is well stated by the Supreme Court of the United States in *Thomas v. Railway Company*, 101 U. S., 82:

“We take the general doctrine to be in this country, although there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers and that the

enumeration of these powers implies the exclusion of all others."

In a later case the doctrine was again stated in much the same language,¹ where Justice Gray said:

"The powers of a corporation, like its corporate existence, are derived from the legislature and are not, as in the case of a copartnership, coextensive with the powers of the individuals who compose it. Its charter, therefore, is the measure of its powers and it can lawfully exercise such only as are expressly or impliedly conferred by that instrument. . . .

"The clear result of all these decisions may be summed up thus: The charter of a corporation, ordinarily, in the light of any general laws which may be applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of others."

It might be said, however, that in many of the State courts the English rule is followed, especially in respect to the transaction of all business relative to the exercise of the ordinary powers of the corporation or which are necessary to carry into effect powers expressly granted.

§ 52. Presumption of a Legal Exercise of Corporate Powers. The presumption of law exists that a corporation is acting within its powers, another phase of the general presumption of law of right doing. Those dealing with a corporation have a right to assume that it is acting within its legal authority, unless the act is clearly in excess of or beyond its charter rights.

Place and Manner of Exercise. It has already been stated that a private corporation is a creature of the State under the laws of which it has been created and that it can have no legal existence outside the jurisdiction of that State. However, the principle or law of comity, as it is termed, is followed almost universally, and corporations are permitted, through its recognition to engage in the transaction of business elsewhere. They are there subject, however, to all the laws and regulations that may be passed

¹ *Central Transportation Company v. Pullman Palace Car Co.*, 139 U. S., 4.

or adopted by that State relative to the doing of business by foreign corporations, and the courts have repeatedly held that restrictions or limitations upon the right of foreign corporations to so engage in business are not to be regarded as discriminations or a denial of the equal privileges, when compared with domestic corporations, which are prohibited by the Constitution of the United States and its amendments.

It is scarcely necessary to suggest that since a corporation is an artificial person authorized only to transact its business by the State, statutory, and constitutional provisions relative to the manner in which its corporate capacities are to be exercised, control. Furthermore, a corporation is not limited by the statutory term of its existence, but may enter into contracts extending beyond its natural life.

§ 53. Classification and Definition of Powers. The term power has already been defined, and the classification suggested by Chief Justice Marshall in his definition of a corporation in the Dartmouth College case is that generally followed. Their powers are commonly divided into express and implied; those directly and clearly given in the charter and others not expressly granted but which the courts hold may be impliedly exercised. Where a legal authority to do an act, to exercise a power is expressly granted, there can be no controversy as to its legal powers or capacities in this respect.

Implied powers are usually divided into those which the corporation impliedly can exercise because essential or necessary to corporate existence, and those which the corporation can exercise because they are necessary or proper to the exercise of the powers expressly conferred. There is, as a rule, little controversy in respect to the rights of a corporation to exercise the implied powers of the first class, viz, those which are absolutely necessary or essential to the existence of the corporation or the transaction of business, the right to transact which has been expressly given. The disagreement in the authorities chiefly arises in respect to the exercise of the implied powers of a corporation of

the latter class, viz, those which it is claimed the corporation can exercise because they are necessary or proper to the exercise of powers expressly conferred. The contest is over the meaning of the words "necessary and proper". The case of *McCulloch v. Maryland*, 4 Wheat., 316, will be found of great assistance in determining this question. There one of the questions arising was the significance of the words "necessary and proper" as used in the Federal Constitution in connection with the powers exercised by the Federal Government. The argument and the reasons given by the court can be applied equally to the powers of the corporation. Chief Justice Marshall said, in the course of his opinion:

"Congress is not empowered by it (the Constitution) to make all laws which may have relation to the powers conferred upon the Government, but such only as may be 'necessary and proper' for carrying them into execution. The word 'necessary' is considered as controlling the whole sentence and as limiting the right to pass laws for the execution of the granted powers to such as are indispensable and without which the power would be nugatory; that it excludes the choice of means and leaves to Congress in each case, that only which is most direct and simple. Is it true that this is the sense in which the word 'necessary' is always used? Does it always import an absolute physical necessity so strong that one thing to which another may be termed necessary can not exist without that other? We think it does not. If reference be had to its use in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient or useful or essential to another. To employ the means necessary to an end is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just con-

struction, that many words which import something excessive should be understood in a more mitigated sense, in that sense which common usage justifies. The word 'necessary' is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison, and is often connected with other words which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases."

In many cases the answer to the query whether a certain act of a corporation is included in the second class of the implied powers, will depend upon the attitude of a particular court upon the question, whether it thinks the proposed act, power or capacity of the corporation desirable, and, further, whether it believes in extending or narrowing the powers of the corporation. The same act or power may be regarded as desirable by some courts and undesirable by others; and the latter may also believe in the general doctrine of narrowing or restricting the powers of the corporation. The answer to the query then will be in the negative. The right to exercise the power will be denied. However, under the doctrine of implied powers, some principles have been adopted which are universally followed. The act, in order that the power to do it may be implied, so it has been held, must tend directly and immediately, not slightly or remotely, to accomplish the objects for which the corporation was created. The word necessary, when the claim is made that the act is necessary to the existence of the corporation, does not always mean an absolute necessity, but merely proper, convenient and reasonably necessary. An incidental or implied power has been defined as "one that is directly and immediately appropriate to the execution of the specific powers expressly granted, and is bounded by the purpose of the corporate enterprise and by the terms and intentions of the charter."² Under these principles, it has been held that a corporation cannot engage in a business different from that authorized by its charter.

² Beach on Corporations, § 385.

A corporation organized for the purpose of booming logs cannot drive them; one chartered to manufacture lumber cannot construct houses with its surplus product; a railroad organized to conduct the business of a common carrier cannot speculate in townsites. A bank cannot act in the capacity of broker in buying and selling bonds for its customers; and an accident insurance company, it was held, could not insure generally against other casualties than accidents.

In an Illinois Railway Co. case v. Marseilles 84 Ill. 145, it was said:

“The rule is familiar and is not contested that such bodies (private corporations) can only exercise such powers as may be conferred by the legislative body creating them either by express terms or by necessary implication; and the implied powers are presumed to exist to enable such bodies to carry out the express powers granted and to accomplish the purposes of their creation.”

In a New Jersey case, New Jersey Railroad Company, etc., v. Hancock, 35 N. J. Law, 545, the same principle was expressed when the court said:

“Power necessary to a corporation does not mean simply power which is indispensable. Such phraseology has never been interpreted in so narrow a sense. There are few powers which are, in the strict sense, absolutely necessary to those artificial persons, and to concede to them powers only of such a character, while it might not entirely paralyze, would very greatly embarrass their operations. Such, in similar cases, has never been the legal acceptance of this term. A power which is obviously appropriate and convenient to carry into effect the franchise granted has always been deemed a necessary one. . . . The term comprises a grant of the right to use all the means suitable and proper to accomplish the end which the legislature had in view at the time of the enactment of the charter.”

And in a Connecticut case the court said:³

“While a corporation has no powers except those which are conferred by its charter, it is not requisite that those

³ Hope Mutual Life Insurance Company v. Weed, 28 Conn., 51.

powers should be expressly granted, but it possesses impliedly and incidentally all such powers as are necessary for the purpose of carrying into effect those which are expressly granted. The creation of a corporation for a specified purpose implies a power to use the means necessary to effect that purpose."

§ 54. Common-Law Powers, So-Called. The old text books and cases refer frequently to the existence of certain incidental or implied powers in a corporation which it could exercise even when not expressly granted. These are known as the common law capacities or powers and are: (1) To have perpetual succession; (2) To sue or be sued; to implead or be impleaded, grant or receive by its chartered name and do all other acts that natural persons may; (3) To purchase lands and hold them for the benefit of themselves and their successors; (4) To have a common seal; (5) To make by-laws or private statutes for the better government of the corporation.⁴ In an early case in New York considering the powers and nature of private corporations, an opinion was rendered by Justice Nelson, who subsequently became a member of the Supreme Court of the United States. He there reduced these common law capacities, from the standpoint of that day, from five to three, viz, (1) To have perpetual succession; (2) To take and grant property, contract obligations, and to sue and be sued by its corporate name as an individual; (3) To receive and enjoy in common grants of privileges and immunities.⁵

§ 55. Principles of Construction. The charter of a corporation, using the term in its broadest significance, is the source of its powers. The cardinal principles of construction have already been given in preceding sections discussing the charter of the corporation and its interpretation. The general doctrine in respect to the powers of corporations has been stated by the Supreme Court of the United States, *Thomas v. Railroad Company*, 101 U. S., 82, in the following language:

⁴ Bl. Comm., 416.

⁵ *Thomas v. Dakin*, 22 Wend., N. Y., 8.

"We take the general doctrine to be in this country, although there may be exceptional cases and some authorities to the contrary, that the powers of corporations organized under legislative statutes are such and such only as those statutes confer. Conceding the rule applicable to all statutes that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers and that the enumeration of these powers implies the exclusion of all others."

A clear distinction can be made between the exercise of the ordinary and usual business powers of a corporation and those which involve the right of possessing and enjoying extraordinary or special privileges and exemptions. The common rule applied in respect to the former class of powers is the liberal one, or of reasonable and progressive construction, as the phrase was used in *Thompson on Corporations*. It is true that a corporation can exercise no powers not fairly expressed or implied in the charter, but, on the other hand, it is not the duty of the courts, nor do they attempt to avail themselves of every opportunity or of finding means on every occasion to defeat or impair the effect of the apparent language of the charter. Corporate powers are to be construed fairly and reasonably. On the other hand, where the question of the right to exercise an exclusive power, privilege or exemption is claimed, the language upon which such a power is based is to be construed strictly, and nothing, the courts hold, will pass by implication. In a Massachusetts case⁶ it was said:

"We know of no rule or principle by which an act creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings or transactions not coming within the exact scope of those designated. Undoubtedly, the main business of the corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted; but it may also enter into contracts and engage in transactions which are incidental or auxiliary to its main business, or

⁶ *Brown v. Winnisimmet Co.*, 11 Allen, Mass., 326.

which may become necessary, expedient, or profitable in the care and management of the property which it is authorized to hold under the act by which it was created.”

And in *Downing v. Road Company*, 40 New Hamp. 230, the court stated as a rule of construction:

“In giving a construction to the powers of a corporation, the language of the charter should in general be construed neither strictly nor liberally, but according to the fair and natural import of it, with reference to the purposes and objects of the corporation. If the powers conferred are against common right, and trench in any way upon the privileges of other citizens, they are, in cases of doubt, to be construed strictly, but not so as to impair or defeat the objects of the incorporation.”

The rule of strict construction, in all its severity, was stated by the Supreme Court of the United States[†] in the following language:

“The rule of construction in this class of cases is that it shall be most strongly against the corporation. Every reasonable doubt is to be resolved adversely. Nothing is to be taken as conceded, but what is given in unmistakable terms or by implication equally clear. The affirmative must be shown. Silence is negation and doubt is fatal to the claim. This doctrine is vital to the public welfare. It is axiomatic in the jurisprudence of this court.”

Concrete Illustrations of Implied Powers. The common incidental or implied powers have been stated in a previous section, but a brief discussion of them may assist the reader to a better understanding of their nature and extent.

§ 56. Perpetual Succession. The right of perpetual succession is an essential characteristic and power of a private corporation. Its possession enables the corporation to maintain its legal identity as an artificial person during the term of its continuance. By the term perpetual is understood not necessarily enduring forever in the common acceptance of the term, but simply for that length of time

[†] *Northwestern Fertilizing Company v. Village of Hyde Park*, 96 U. S., 659.

which the corporation is permitted to exist under the laws of the State creating it. Some charters originally were granted giving to the corporation a perpetual life in the exact sense of the word. It is a common and universal practice now for the creating power to limit the duration of the existence of the corporation, and the term perpetual succession, therefore, means simply, as already stated, the right of a corporation to exist during the period limited by law. This characteristic of perpetual succession, using the term as above limited, is one of the principal distinguishing features of a private corporation as compared with a natural person or a group of natural persons acting under any form other than that of a corporation. The corporation maintains its identity during its life, irrespective of the death of its members. These may be constantly changing, by death or transfer of interest, and yet the artificial person exists as a legal person. Blackstone compared the corporation in this respect to the River Thames, which he said remained the same at any given point, although the particles of water which composed it were constantly changing.

§ 57. A Common Seal. The implied right of a corporation to use a common seal undoubtedly had its origin in the universal use by natural persons, under the common law, of a seal, the custom based upon the inability of many to write. The use of the seal was a requisite to the legal act of a natural person and this principle was naturally applied to artificial persons as they were created. This rule has been so modified that a corporation may legally act without a seal in all cases where an individual may do so, unless especially required by some statutory provision.

§ 58. Power to Make By-Laws. Another implied or common law capacity, so-called, is the power to make by-laws. A by-law has been defined as "a rule of permanent character adopted by a corporation for the regulation of its internal affairs." Its purpose is to regulate the conduct of the business of the corporation and to define the duties of its various officers and agents. The right to

adopt by-laws is usually vested in the members or the stockholders of the corporation, unless by the articles of incorporation this power is given to the board of directors. It is axiomatic that the existence of the right, whether in the members of the corporation or its board of directors or managing officers, creates the coextensive power, in the proper and legal manner, of amending or repealing them. The provisions of the charter, or of the general laws of the State, if they exist, must be strictly observed in the adoption, the amendment, or the repeal of by-laws.

Upon Whom Binding. It may be important to know at times the legal effect of a by-law upon the corporation itself or those dealing with it, and this condition is suggested by the title of this paragraph. The corporation clearly is bound and the members of the corporation; also those dealing with the corporation and having actual notice of the existence of a by-law which may affect the legal results of a business transaction. The members of a corporation are bound by the by-laws at all times and under all conditions, even though they have no actual notice or knowledge of their existence. If actual notice or knowledge is lacking, the courts hold that because of the fact of membership the principle of constructive notice or knowledge is applied. Constructive notice or knowledge is that which is imputed to the person himself, or which he necessarily ought to know, or which, by the exercise of ordinary diligence, he might know. The legal effect of by-laws, their interpretation and construction, is a judicial function, and one exercised, therefore, by courts of competent jurisdiction.

Requirements of a Legal By-Law. A by-law, it has already been stated, is a rule of permanent conduct controlling the action of the corporation and of its members and officers in the management of its affairs. It is, therefore, a law, though limited in its scope and application. The by-law, to operate legally as a rule of conduct, must possess all the characteristics of a law. The charter of the corporation is its superior and paramount law, and it follows

that a by-law cannot be inconsistent with or contravene any of its provisions or terms. The Constitution of a State or of the United States is the superior and paramount law, and the act of any subordinate body cannot be contrary to its provisions. A by-law cannot impair a vested right. It must not conflict with the general principles of the common law where they control, or be repugnant to laws of the State. A by-law of a corporation fixing a penalty for the doing of an act by its members greater than the penalty provided by the general laws of the State for the commission of the same act, was held invalid. A by-law cannot have a retroactive effect, a principle which applies universally to all legislation. By-laws must be reasonable and not oppressive; neither can they operate in restraint of trade or be against the public policy. The latter phrase has been defined as follows: "By public policy is intended that principle of the law which holds that no subject can lawfully do that which has a tendency to be injurious to the public or against the public good."⁸ It is a term which is indefinite both in its meaning and application, and should be adopted as a reason for a legal holding only when all other reasons fail, for, as was said by an eminent English judge many years ago, the adoption of this as a legal reason for a decision is like "mounting an unruly horse; one never knows where it will land him." They must be general and not for the benefit of or detrimental to any particular member or class of members; they must be uniform in their application, principles also applying to all legislation.

As illustrative of the principles above referred to, some cases may be noted. A by-law requiring, in the absence of a charter provision to that effect, the consent of the president of the corporation to a transfer of stock was held void as in restraint of trade, but by-laws requiring the surrender of a certificate of stock to certain designated officers of the corporation, and its cancellation by them, in case of sale and transfer of stock, have been usually sustained as valid and not unreasonable nor in restraint of

* Greenwood on Public Policy.

trade. A by-law of a corporation requiring as a qualification for membership a prohibition against membership in the militia was held invalid, as in contravention of the law of the land. By-laws of social clubs, chambers of commerce, boards of trade, and similar bodies providing for the expulsion of members for dishonorable conduct and prohibiting the transfer of membership, so long as the member may be indebted to the corporation or to any other member, have been held valid.

§ 59. By-Laws Restricting Powers of Corporate Officers and Agents. A corporation being an artificial person necessarily must act through natural persons, its agents. The adoption of by-laws defining and establishing the powers of corporate officers and agents is a common custom. In many cases they restrict or limit the power of the agent when acting for the principal, viz, the corporation. The authorities are conflicting upon the question of the effect of a restrictive by-law as between third persons dealing with the corporation and the corporate agents acting in its behalf. This is especially true where the third person has the legal right to presume from the indices of authority or the title of a corporate officer or agent, with whom he is dealing, that the transaction in question comes within the general or apparent scope of the authority of that corporate agent, and that his act, therefore, is binding upon the principal. As stated in a preceding section, the by-laws of a corporation are not binding upon third persons dealing with the corporation unless they have actual notice or knowledge of the by-law and act upon that knowledge. The weight of authority inclines to the view that a by-law which limits the authority of a corporate agent will not affect the legality of the transaction, where he acts within the apparent scope of his power and authority, though in excess of his actual authority as fixed by the by-law. There are authorities, however, which hold to the contrary. The sounder reasons support the weight of authority, for, as was said in a recent New York case:⁹

⁹ *Rathbun v. Snow*, 123 N. Y., 343.

“The defense based upon a limitation in the by-laws of the company, of which the plaintiff had no knowledge, cannot be sustained. By-laws of business corporations are, as to third persons, private regulations, binding as between the corporation and its members, or third persons having knowledge of them, but of no force as limitations per se as to third persons of an authority which, except for the by-law, would be construed as within the apparent scope of the agency. Third persons may act upon the apparent authority conferred by the principal upon the agent and are bound by secret limitations or instructions qualifying the terms of the written or the verbal appointment.”

§ 60. Power to Acquire and Hold Real Estate. At common law, one of the implied or incidental powers of the corporation was “to purchase lands and hold them for the benefit of themselves and their successors.” This implied power exists almost universally at the present time where the power to purchase and transfer real property is necessary to the existence of a corporation, or convenient and proper to the purposes for which the corporation was organized. The Minnesota statutes contain a provision which is quite common to the States: “Every corporation formed under the provisions of this chapter shall have power . . . to acquire by purchase or otherwise, and to hold, enjoy, improve, lease, encumber, and convey all real and personal property necessary to the purposes of its organization, subject to the limitations hereafter declared.” Independent of a statutory provision of this character, a corporation will have the implied power, under the circumstances first noted in this section, to acquire, hold, and transfer real property.

An Indiana case,¹⁰ in considering the question of the power of private corporations to acquire and alienate real estate, divided them into four classes, as follows: “First, those whose charter or law of creation forbids that they should acquire and hold real estate. In which case a corporation cannot take or hold real estate; and a deed or devise to it passed no title. (Note, however, the discussion on

¹⁰ Hayward v. Davidson, 41 Ind. 212.

the point which follows.) Second, those whose charter or law of creation is silent on the subject. In such case, as a general rule, there is no power to acquire and hold such property. But if the objects for which the corporation was formed cannot be accomplished without acquiring and holding the title to real estate, the power to do so is implied. Third, those corporations whose charter, etc., authorizes them in some cases, or for some purposes, to take and hold the title to real estate. In these cases, as the corporation may for some purposes acquire and hold title, it cannot be questioned by any party, except the State, whether the real estate has been acquired for the authorized purposes or not. Fourth, those whose charter, etc., confer a general power to acquire and hold real estate, such corporations may take and hold real estate as freely and as fully as natural persons."

Limitations upon Power to Acquire. To prevent the acquisition of large tracts of land by corporations, through the English statutes of mortmain, ending with 9 George II., they were forbidden to take and hold real property without a license from the crown. Statutes of this character have not been passed generally in the United States, although recognized in Canada, Great Britain and in Pennsylvania. Statutory or constitutional provisions have been quite commonly adopted throughout the United States by the different States limiting the power of alien corporations to acquire and hold real property. The Minnesota statute is illustrative of this class of laws:¹¹ "Except as hereinafter provided no person, unless he be a citizen of the United States or has declared his intention to become a citizen, and no corporation, unless created by or under the laws of the United States or of some State thereof, shall hereafter acquire lands or any interest therein except such as may be acquired by devise or inheritance and such as may be held as security for indebtedness. . . . Except as hereinafter provided, no corporation or association, more than twenty per cent of whose stock is owned by persons not

¹¹ Revised Laws of Minnesota, 1905, §§ 32, 35, *et seq.*

citizens of the United States, or by corporations or associations not created under the laws of the United States or of some State thereof, shall acquire lands in this State.”

In the absence of special statutory provisions, there is no limitation in either England or the United States to take real property by devise, though this power, it must be understood, can only be exercised in the acquirement of property for use by the corporation in the conduct of its business as authorized by the general objects of the corporation. The acquisition of real property through any method, for purposes entirely foreign to the business for which the corporation was organized, may be directly and in any case is impliedly forbidden.

Express or implied prohibitions against the acquisition of real property by private corporations does not prevent them, however, from taking lands as a security for a debt due the corporation, or in the satisfaction and payment of a debt, nor do they apply to the acquisition of real property at a foreclosure sale. In determining the power of a corporation to acquire real property under its charter, the rules for the interpretation of charters and the construction of corporate powers, as already stated in preceding sections, must be applied and followed. The courts have held, as illustrating these principles, that a manufacturing corporation may purchase land in an adjoining city upon which to construct and maintain an office building of a size at that time largely in excess of its actual needs.¹²

A manufacturing corporation, it has also been held, may purchase land not only for the purpose of erecting its factories, but also, if it is reasonably necessary, for erecting houses for its employees.¹³ A corporation created for charitable purposes and for the promotion of inventions and improvements in the mechanic arts, it was held, had authority to purchase land for the erection of a building for the purpose of holding exhibitions and meetings.¹⁴

¹² *People v. Pullman Palace Car Company*, 175 Ill. 125.

¹³ *Steinway v. Steinway & Sons*, 17 Misc. Rep. (N. Y.), 43.

¹⁴ *Richardson v. Mass. Charitable and Mechanic Ass'n*, 131 Mass. 174.

If the purposes for which a corporation acquires real property are to procure a monopoly, the transaction will be regarded as not only *ultra vires*, but as contrary to public policy and illegal; though, if this power of the corporation is expressly conferred by its charter, the contrary rule will hold.

The power to convey is, of course, coextensive with the power to take and hold subject to the one limitation that a corporation must not grant away or pledge its property and franchises to an extent which will prevent it from carrying out the purpose of its creation. This limitation, however, is almost exclusively applied to those corporations of a quasi-public character.

Title Acquired. In the absence of statutory provisions, and where the corporation is authorized expressly or impliedly to acquire and hold real property, it may exercise its right in the same manner and acquire the same estate which it would be possible for a natural person to acquire under similar circumstances. Where the lawful authority exists, the title acquired may therefore be a fee simple, leasehold interest or an easement merely.

Right to Acquire; How and by Whom Questioned. A corporation may acquire and attempt to hold real property contrary to its charter or to the general principles named in the preceding sections, and the question then arises of its legal title to the property thus acquired and by whom its rights can be questioned. This subject will be more fully discussed under the chapter relating to the *ultra vires* acts of a corporation. It can be stated here, however, that although there are some cases to the contrary, the great weight of modern authority holds that where a corporation has acquired property contrary to an express prohibition or to its charter powers, the title to the real estate so acquired passes to the corporation, and its legal rights in respect thereto can only be questioned by the State.

This principle is obviously based upon the fundamental one that all the powers and capacities of a corporation pro-

ceed from the State. In respect to the acquirement of property, real and personal, no rights are derived from third persons dealing with the corporation. If the corporation has violated a law of the State or of its charter provisions, it is for the State and the State alone to question the legality and the legal effect of such transactions. This rule of law has also been applied on the grounds of public policy, for the adoption of another different one would lead to endless confusion and inconvenience, not only in the transaction of the corporate business, but in respect to real estate titles throughout the land. It follows, therefore, that even where a real estate corporation has acquired and is holding lands contrary to law it may convey a good title for them to a grantee or maintain an action against trespassers. The rights of a corporation to acquire and hold real property cannot be inquired into collaterally or taken advantage of by third persons dealing with the corporation.

§ 61. General Powers as to Property. Within the limitations of the purpose of its creation, and subject to the restrictions already mentioned, a corporation has the same right to acquire and control property, other than real, that a natural person has. At common law there was no restriction placed upon the quantity or the value of the personal property which a corporation might hold, except such limitations as might grow out of the nature of the corporation itself and the purposes of its creation. The statutes of mortmain were never held to apply to personal property. The true rule, at the present time, is that a corporation may purchase and hold or sell personal property without restraint other than that which is generally imposed by law, its charter, and the objects of its creation.

§ 62. Power to Contract. The rules of law relative to the construction of the corporate charter and the extent of its powers apply to the subject of this section. The exercise of corporate powers, in a large measure, involve acts of a contractual nature. The general rule in respect to the validity of a corporate contract is that it is valid.

The presumption of law being in favor of right doing, the contracts of a corporation are presumed to be within the lawful scope and objects of the corporation, until, by a preponderance of proof, the contrary appears. The burden of establishing a corporate contract as *ultra vires* is upon the party making this contention. The courts follow, also, the general principle that, within the limitation of its powers, either express or implied, and in furtherance of the general purposes for which it was created, a corporation may as freely contract as an individual might under like circumstances and conditions.

Formalities to Be Observed in the Execution of Corporate Contracts. At common law the rule was rigidly adhered to that a corporation could legally enter into a contract only by the use of its seal. The corporation "spoke through its seal"; but this rule has been relaxed to such an extent that for many years a corporation has only been required to use its seal when, under the same conditions, its use was obligatory upon natural persons. Justice Story, in an early case in the Supreme Court of the United States,¹⁵ said, after discussing the common law rule:

"The technical doctrine that a corporation could not contract, except under its seal; or, in other words, could not make a promise, if it ever had been fully settled must have been productive of great mischiefs. Indeed, since the doctrine was established that its regularly appointed agent could appoint in their name without seal, it was impossible to support it, for otherwise the party who trusted such contract would be without remedy against the corporation. Accordingly, it would seem to be a sound rule of law that wherever a corporation is acting within the scope of the legitimate purposes of its institution, parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed upon them by law and all benefits conferred at their request raise implied promises for the enforcement of which an action will lie."

The by-laws of the corporation may prescribe certain

¹⁵ *Bank of Columbia v. Patterson*, 7 Cranch. 298.

formalities to be observed by it in the execution of its contracts. A by-law of this character, it has been held, is not binding upon one who, with no knowledge of its existence, enters into contractual relations with the corporation, and where the officer or agent with whom he is dealing is apparently clothed with full power to bind the corporation. If the third person has knowledge of by-laws limiting the authority of the corporate officers or agents to act, he is clearly bound by this actual knowledge. The courts also hold that third persons dealing with the corporation are bound by the limitations upon its powers contained in the charter of the corporation, though sometimes this rule has been doubted where the charter is a special act of which even a court will not take judicial notice, but which must be specially pleaded. One dealing with a corporation through its agents may rightfully assume that it is acting within its powers and with due observance of the formalities and steps required by its by-laws and its charter, unless the contract itself or the manner of making it is clearly and unmistakably in excess of its corporate powers. Statutory provisions establishing formalities to be observed by corporations in the making of contracts must be observed either strictly or substantially, as the provisions of the law are held to be either mandatory or directory in their character. The authority of corporate officers and agents will be considered in a subsequent chapter.

Ratification and Estoppel. A contract entered into by a corporation in an irregular or informal manner, or one made by a corporate agent in excess of his apparent authority, may subsequently become binding upon the corporation through the doctrine of ratification. This principle will be applied where the corporation subsequently is informed of the existence of the contract and takes no steps to disaffirm it; where, without its recognition, it takes no steps to disaffirm the contract, or where it formally adopts the contract, makes it its own or accepts its benefits. "Authority in the agent of a corporation may be inferred

from the conduct of its officers or from their knowledge or neglect to make objections as well as in the case of individuals.”¹⁶

In the case of irregular, informal, and even unauthorized contracts, the parties may be bound through the doctrine of estoppel. This principle is applied sometimes in those cases where it was represented and assumed by the contracting parties that the capacity to make the contract existed and that its execution was regular and formal, and that all of the provisions of the charter or of the by-laws had been complied with as required. A definition of estoppel was given in a leading case,¹⁷ and may be useful at this time. Lord Denman, in that case, said:

“Where one by his words or his conduct wilfully causes another to believe in the existence of a certain state of things and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time.”

Contracts Void as Against Public Policy. All persons, artificial equally with natural, are forbidden to enter into contracts which the sound policy of the law considers detrimental or injurious to the public interests. This principle applies particularly to corporations of a quasi-public character, and arises from the nature of the privileges or franchises given them by the State. The established principles of the common law may stamp certain contracts with this character, and absolute prohibitions may, in other cases, render them illegal as well as *ultra vires*. Corporate contracts may not only be *ultra vires*, or in excess of their corporate powers, but also illegal for the reasons stated above. A lobbying contract would clearly be illegal as well as *ultra vires*, because involving the use of improper means to influence or prevent legislation. Contracts which effect an unreasonable restraint of trade or tend to create

¹⁶ *Sherman v. Fitch*, 98 Mass. 59.

¹⁷ *Pickard v. Sears*, 6 Ad. and El. 469.

a monopoly and prevent competition, whether in violation of well recognized principles of common law, or contrary to the express provisions of some statute, are also illegal and not merely *ultra vires*. Traffic contracts between common carriers, pooling arrangements, contracts securing to a firm exclusive and lower rates, may be illegal because contrary to law. The Interstate Commerce Act and the Sherman Anti-Trust Act, with their various amendments as passed by the Federal Congress, prohibit corporations as well as individuals from making contracts of the character suggested, and are illustrative of this class of statutory regulations.

§ 63. Power to Raise Money. The raising of money is generally recognized as one of the chief objects for which private corporations are formed. The use of capital is indispensable in most cases to the conduct of their business and the exercise of their powers. Two methods are ordinarily employed by a corporation to accomplish this purpose; first, by the issue of its capital stock; and, second, by loan either secured or unsecured. In the case of stock corporations, the charter provides the maximum limit of its capital stock, and if the entire amount has not already been subscribed and paid in, or if the corporation has been duly authorized to increase its capital stock, it may issue new shares and dispose of them for this purpose. It is through the issue of its original capital stock that its first funds are secured for the transaction of its corporate business and the payment of its creditors. The shares of stock are generally sold to shareholders at their par value.

The other method employed by corporations to secure funds for carrying on their corporate business, is through the making of loans, either secured or unsecured. In the absence of express restrictions in its charter, a private corporation may borrow money, the same as a natural person, whenever the nature of its business demands or authorizes it; but it is clear that it cannot do so if the act is unauthorized or if the purpose for which it is organized does not require it. It is common for the State to require

that in articles of incorporation the maximum amount of corporate indebtedness shall be stated. If a provision to this effect exists, the corporation is limited clearly in the maximum indebtedness which it can incur through the borrowing of moneys and whether the loan is secured or unsecured. The necessity for security depends, necessarily, upon the credit of the corporation, the amount of capital invested or employed in the transaction of and the volume of its business. In many instances, a corporation is required to give security for moneys borrowed, which usually consists of a mortgage or pledge upon specific property, or generally upon its entire corporate property and franchises. A private corporation, not of a quasi-public character, ordinarily is not restricted in the extent to which it can mortgage its property and franchises for the purpose of securing a loan. The courts hold, however, that in respect to quasi-public corporations, and especially railway companies, that the corporate power to mortgage the property and the franchises is not an implied one, but must be expressly granted. This principle is based upon the reason that corporations of this character are engaged not only in the carrying on of their business upon private capital and in the capacity of a private corporation, but are also required to perform, because of the nature of their enterprise, certain duties to the public at large. The business of a railroad corporation or common carrier is the transportation of freight and passengers. Because of the nature of this business, they are subject to a greater degree of control and regulation by the State, and it is also regarded as against public policy that they should, by any act of theirs, impair or destroy their ability to perform their public duties. Through the mortgaging of their franchises and property, the courts have held that this result may be attained. The power to mortgage the corporate franchises and property of a quasi-public corporation must be expressly granted.

§ 64. Power as to Own Stock. *By Purchase.* The authorities are conflicting upon the question of the power

of a private corporation to acquire and hold its own stock. There are two well-established lines of decisions, one holding that in the absence of statutory limitations the corporation can acquire, by purchase or otherwise, shares of its own stock, and hold them as a corporate asset. But these decisions further hold that this cannot be done where the effect of such a transaction is to perpetrate a fraud upon or affect the rights of corporate creditors. The other line of cases hold that, independent of statutory provisions, a private corporation cannot so acquire and hold its own stock, the reason being that a transaction of this kind works a fraud upon and substantially affects the rights of the corporate creditors.¹⁸

By Increase and Decrease. The amount of capital stock of a stock corporation is fixed by the articles of incorporation, and it is well settled that this can neither be increased nor diminished without legislative authority. The power to increase or decrease its stock must be expressly given, and it must be exercised by the stockholders of the corporation, for it is considered one of the extraordinary or fundamental powers of a corporation. Where the capital stock of a corporation is increased, the rule of law generally obtains that the stockholders are entitled to their *pro rata* or proportionate part of the increase at the price fixed for which the stock is to be sold.

Many of the States provide a liability of shareholders, in addition to or in excess of their common law obligations, namely, the par value of their stock. After the reduction of the capital stock of a corporation where an additional stockholders' liability is attached by constitutional or statutory provision, this is not diminished through the reduction. Creditors whose claims have accrued prior to the reduction of the capital stock can look for a payment if the corporate property is insufficient to the original liability of the stockholders. Those whose claims have been created subsequent to the reduction can only enforce a

¹⁸ Clapp v. Peterson, 124 Ill. 26; Coppin v. Greenless Co., 38 O. St. 275.

stockholders' liability as based upon the reduced capital stock.

§ 65. Power as to Negotiable Instruments. The general rule in this country is that a corporation organized for pecuniary profit has the implied power to make, draw, accept, or endorse negotiable instruments in furtherance of and when within the scope of its corporate business. If these acts are foreign to the purposes for which the corporation was created, or contrary to the terms of its charter, they cannot be sustained. A corporation has, however, no implied power to lend its credit by becoming a party to a note or bill for the mere accommodation of another, though that act may be, indirectly, beneficial to the corporation itself. An accommodation note or bill may be enforced, if it passes into the hands of a *bona fide* holder, without notice of its character, and when within the apparent scope of the powers and authority of the corporation. The courts have also held that an accommodation endorsement may be enforced if all of the stockholders consent.

§ 66. Power to Guarantee Bonds. It is customary for railroad corporations to guarantee, in many cases, the bonds of subsidiary and auxiliary companies. This power must be expressly conferred and cannot, as a rule, be implied. The principle is based primarily upon the reason that it is inexpedient to permit a corporation to subject itself and its stockholders to the risks involved, which necessarily follow a transaction of this character, and the further reason that, especially in the case of quasi-public corporations, results might be accomplished contrary to public policy or some express statutory provision. In some cases, where the organization of a subsidiary line is convenient and proper, and in furtherance of the objects for which the corporation was created, it has been held that in the absence of statutory prohibitions the implied power may exist. It is necessary, however, to the validity of the transaction, that the company so guaranteeing the bonds or securities of another receive a consideration which may be a deposit of stock as collateral. Ownership of

the stock or the general benefit and advantages derived from the control of the subsidiary line would also be a consideration.

§ 67. Power to Execute and Issue Bonds. As a means of raising money, and in the absence of express restrictions, a corporation has the implied power to execute and issue bonds for its legitimate corporate purposes. These may be issued in any form or contain any provisions not prohibited by its charter, using the term in its broad sense, which includes, it will be remembered, general statutes applicable to that class of corporations. Bonds issued by a corporation are regarded as negotiable instruments, whenever the intent to make them so is to be gathered from their form and the manner in which they are put in circulation. Statutory provisions, if such exist, in respect to the form, time of payment, or amount, must be complied with; and the rule also obtains, as already suggested, that no corporation can lawfully issue its negotiable securities, including bonds, for a purpose which is foreign to the objects for which it is created. Unless prohibited by law, it may issue and sell them at a discount. In some States, in order to prevent a fictitious issue of indebtedness, statutes have been passed prohibiting the issue of securities, except for money paid, labor done or property actually received by the corporation, and further providing that corporate obligations issued contrary to such provisions shall be void and indebtedness thus created unenforceable. These statutes, however, are liberally construed in favor of the corporation, and the fraudulent character of such indebtedness must be clearly established. It is a well recognized principle that many corporations, especially at the time of their organization, and those whose credit has become involved, cannot sell their securities for the highest price obtainable. They are not prohibited, under such circumstances, from issuing their securities and disposing of them at the best possible price, which may be less than par.¹⁹ Where securities are issued representing property

¹⁹ *Handley v. Stutz*, 139 U. S. 417.

received or services rendered, it is sufficient if a fair and reasonable value is placed upon the latter for the obligations issued in exchange. The fair and reasonable value of the service rendered or the property received at the time of the exchange establishes the good faith of the transaction, and it will not be regarded as fraudulent in its character if subsequently the property so received materially depreciates in value.

§ 68. Power of Eminent Domain. The power of eminent domain is a sovereign right inherent, inextinguishable and continuing in its nature. It is that power of the State to appropriate or take private property for a public use upon the payment of just compensation to the owner which, it has been held, must be full, ample, just, and complete. Constitutional provisions protect the private owner in the possession and use of his property against the exercise of the power without the payment of this just compensation. The State can exercise the power of eminent domain or, it has been held, it may lawfully delegate the right to such agencies as it may select. The limitation, however, exists in all cases of delegation that private property can be taken for only a public use. The right to exercise this power by a private corporation, it will be noted from the preceding, is limited to those of a quasi-public character. Public corporations, common carriers, and other corporate organizations of a like character are the agencies to which the right of an exercise of the power is usually delegated by the State, and it must be conferred in express terms. It can never be implied. Its exercise by a corporation to whom the power is delegated must be in conformity with statutory and constitutional provisions; and a few of the essential principles controlling will be noted in the following sections.

Essentials of a Legal Exercise of the Power. Upon an examination of constitutional phrases granting and limiting an exercise of the power of eminent domain, it will be noted that three words or phrases are used which have been the occasion for judicial construction by many courts.

These are, taking them in their orders: "property", "taken" or "taking", and "public use".

Property, Definition Of. "The word commonly used in connection with the exercise of the power of eminent domain is 'property' and this suggests the question, what is property? A correct determination of the meaning of the word is important, for if the thing taken be not legally considered property, clearly the owner is not entitled to compensation and an exercise of the power is not necessary. The most satisfactory definition of property is that given by Jeremy Bentham in which he says: 'The integral or entire right of property includes four particulars: (1) right of occupation; (2) right of excluding others; (3) right of disposition or the right of transferring the integral right to other persons; (4) right of transmission in virtue of which the integral right is often transmitted after the death of the proprietor without any disposition on his part to those in whose possession he would have wished to place it.' Or, summarized, the rights of occupation, exclusion, disposition, and transmission. Property, therefore, consists not in the thing or the subject of a right itself, but of rights in things created, sanctioned and protected by law. Formerly, a narrow and restricted meaning was attached to the word 'property' and the property owner was, therefore, restricted in the amount of compensation which he might recover. The modern tendency is towards a liberal construction of the word and the right of compensation is correspondingly enlarged."²⁰

Taking or Taken, Definition Of. "The word 'taking' or 'taken' was the one originally and most commonly used in statutory or constitutional provisions relative to the exercise of the power of eminent domain. The extent of compensation to which one is entitled and the proper exercise of the power depend upon what is taken and whether there is a taking. The early meaning given to the word under discussion embodied the idea that before compensation could be recovered by the individual or in order to consti-

²⁰ Abbott, Public Corporations, § 431.

tute a taking, there must be an actual physical dispossession of the thing taken from its original owner. This meaning was probably based upon a narrow construction of the word 'property', but with the adoption of a broader interpretation of that word, the meaning of the word 'taking' has been correspondingly enlarged; and the modern view is that to constitute a taking an actual physical divesting or dispossession of property is not necessary, but a damage to or deprivation of any of the essential rights of property will be sufficient to constitute a taking and entitle the owner to compensation under the constitutional provision. These essential rights have already been stated as being those of occupation, exclusion, disposition, and transmission."²¹

Various phrases in addition to or in connection with the words "taking" or "taken" will be found used in the Constitutions of different States. These phrases, as thus variously used, and including such words as "damages", "injured", or "injuriously affected" are intended to enlarge the right to compensation, and they include physical injuries not held to be "a taking" within the strict meaning of those words.

Public Use, Definition Of. What is a public use is a question for the judiciary and no problem has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words "public use" as found in the different State constitutions regulating the right of eminent domain.²²

"The power of eminent domain is authorized only when property is to be taken for a public use; it cannot be exercised for a mere private purpose. The State has no power even when compensation is paid in full, in any case, to divest an individual of his property and grant it to another without some reference to a use to which it is to be appropriated for the public benefit. What is a public use is a judicial question and one upon which

²¹ Abbott, *Public Corporations*, § 437.

²² *Dayton Mining Co. v. Seawell*, 11 Nev. 394.

there is a great variety and conflict of reasoning and results. The question of public use is not affected by the character of the agency employed. The query is what are the objects or results to be accomplished, not who are the instruments or agencies selected by the sovereign for attaining this. Neither is the question of public use affected or determined by the fact that the use or the benefit is local or limited, nor is it determined by the necessity or the lack of necessity for the condemnation; neither is it established by the frequency or the infrequency of the use.

“There are two theories in respect to the proper and legal meaning of the words ‘public use’ as used in constitutions or legislative enactments. The first might be termed the theory of strict construction, and it maintains the principle that for a public use to exist there must be a literal use or right of use, on the part of the public generally, or limited portion of it, without the payment of compensation for the exercise of this use or right of use.

“The second theory is based upon a liberal interpretation of the words ‘public use’ and holds that the words are equivalent to public benefit, utility or advantage, and are not limited by the actual use by the public of the property taken or some limited portion of it. The modern construction of the words seems to be in favor of the second or liberal interpretation and of an equivalent meaning of use by the public.”²³

Construction of Right to Exercise. Through the exercise of the power of eminent domain by the State or any of its delegated agencies, the private property of an individual is arbitrarily and forcibly taken to supply the demands of some great and urgent public need. It is axiomatic to state that under these circumstances the authority to exercise the power must be strictly followed. The condition precedent to the valid exercise of the power as prescribed by the action of the legislative body must be strictly construed, the authority must be expressly given and the manner of its exercise, as provided by law, strictly followed. All statu-

²³ Abbott, Public Corporations, § 435.

tory requirements are considered essential. The fact that they are prescribed by law in connection with an exercise of the power stamps them with this character and not their relative importance. It is not for the courts to say that because a statutory provision is apparently unimportant or relates to a matter of detail that it is not essential.

Notice to Property Owner. So far as the owner of property to be condemned is affected, his only concern is the just compensation to which he is entitled, and it is fundamental in connection with property interests that a person cannot be legally or justly deprived of them without notice to him of the action leading to this result. It is, therefore, a jurisdictional condition that the owner whose property is sought to be taken must be apprised in some way of the pendency of the proceedings through which this end is sought to be attained. It is a prerogative for a law-making body to determine the character and extent of the notice necessary, but the legality of its action will be measured in this respect by that constitutional provision which prohibits the taking of property without due process of law. A New York case decided that "due process of law requires that a person shall have reasonable notice and a reasonable opportunity to be heard before an impartial tribunal before any binding decree can be passed affecting his right to liberty or property." Notice is universally regarded as one of the essentials of due process of law. It need not be, however, in all cases actual, and in fact in many instances where the power is exercised by public corporations for the purpose of establishing highways, and streets, constructive notice alone is given and is regarded by the courts as sufficient. Statutory requirements as to the manner in which notice must be served upon the property owner must be strictly followed, and it has been held that the absence of a requirement calling for the service of notice does not relieve one exercising the power of eminent domain from giving notice. Many cases hold that independent of statutory provisions, the fundamental provision obtains that private property can not be taken with-

out due process of law, and this included, as stated above, as one of its prime essentials, the giving of notice.

§ 69. Miscellaneous Powers. A corporation has no implied power to become a surety or guarantor for the debts, defaults, or acts of another. These powers must be expressly conferred by the charter. Corporations have no implied power to enter into a partnership with individuals or other corporations, or into agreements which substantially create the relation of a partnership. This rule is especially applicable where the business, or a part of it, to be carried on by the partnership is *ultra vires* in respect to the corporation entering into such a relation.

Corporations have the full power, when acting in furtherance of their proper corporate objects, to the same extent as natural persons to act as an agent or attorney, and to employ others in the management and conduct of their business. They also have the full power to bring all necessary actions and proceedings for the enforcement of their rights or the protection of their property, and the possession of this power to sue necessarily implies the lesser one of compromising and adjusting differences which may arise in connection with the conduct of their corporate business.

§ 70. Power to Acquire Stock in Other Corporations. This power, necessarily, must be expressly conferred. Corporations have no legal right to purchase and hold the stock of other corporations, for otherwise it would be possible for them to substantially engage in a business not authorized by their charter. This condition might subject the stockholders to risks not intended to be assumed by them, and the State, further, might be deprived of its right to control and to regulate the integral business of the corporation. In many cases, the right is directly conferred in the charter, but even where the power is expressly conferred it is limited to the acquisition of capital stock in corporations organized for the same general purposes and objects as the holding company.

§ 71. Power in Respect to Consolidation. This power is also one which must be expressly conferred by the charter

of a corporation used in its broad sense. No implied power exists in a corporation to consolidate with others, even with those organized for the same general purposes. Public policy is the basis of this principle. If consolidations were permitted without restraint, especially by corporations of a quasi-public nature, the healthful competition necessary to the best welfare of the community might be seriously impaired or entirely destroyed. In many States, statutes have been passed prohibiting the acquirement or the consolidation, under any circumstances, of parallel and competing lines of railway.

Methods and Meaning of Consolidation. By consolidation is understood a merging or amalgamation of two or more corporations into one corporate body whereby their powers, properties, and privileges, together with their liabilities and obligations, pass to and devolve upon a new juridical person. The resulting extent of the powers to be exercised and the liabilities to be assumed by the new corporation will depend, necessarily, upon the terms of the legislative consent authorizing the consolidation.

Several methods of consolidation are adopted, one of which may result in the merging of two or more corporations, one remaining in existence and taking to itself all of the rights, properties, franchises, and duties of the others, which are dissolved; the merging of two or more corporations into a new one, the consolidation resulting in the dissolution of the old corporations and the new one acquiring the right to possess, enjoy, and assume all of the rights, duties, properties, and liabilities of the companies dissolved; or the combination of several companies, all of which remain in existence, but which are controlled by one set of managing officers or directors. A private corporation is a purely voluntary corporation, and it is without the power of the State to force a group of persons to organize and exercise or possess corporate capacities. Equally so a consolidation in any of its forms cannot be forced upon independent and separate corporations. The act is a purely voluntary one on their part under the grant of legis-

lative authority to each of the constituent companies. At common-law, corporations have no implied power to consolidate or to form partnerships, and the rule obtains in this country that the corporation can only exercise those powers authorized by its charter. The consent of the State must be expressly conferred, and the absence of prohibition will not be construed as an implied consent on its part.

Consent of the Stockholder. The charter of the corporation is a contract, not only between the State and the corporation, but also between its members, and this original contract cannot be altered without their consent. The rule, therefore, necessarily follows that unless consolidation statutes provide for the consent of a stated majority to the consolidation, the consent of every stockholder is necessary. Where a corporation is organized under the general laws which permit its consolidation, the implied consent of the stockholders is presumed, as the power to consolidate constitutes a part of the contract between the stockholders; and a stockholder may be also estopped to contest a consolidation by his own acts, or his rights in this respect may be lost by his laches.

The property rights of stockholders, however, are not affected by the legality of the consolidation, as they cannot be forced into a consolidated company against their consent. If a majority, or a required statutory proportion, determine upon consolidation, the rule generally obtains that a dissenting stockholder cannot prevent action of this character by the corporation. He cannot be, however, deprived of his property or rights in the corporation, and provision is usually made securing these to the stockholders who refuse to come in.

Rights of Creditors on Consolidation. The liabilities of the constituent companies usually are assumed by the consolidated company; or, in some cases, where the constituent companies are not dissolved, their liabilities can be enforced only against them or against their property taken over by the new and consolidated corporation. Generally, when corporations are consolidated, the new company takes

the properties, rights, and franchises of the old corporations subject to the same liabilities and burdens which attach to the charter and business of the constituent companies.

“For the purpose of answering for the liabilities of the constituent corporations, the consolidated company should be deemed to be merely the same as each of its constituents, their existence continued in it under the new form and name, their liabilities still existing as before and capable of enforcement against the new company in the same way as if no change had occurred in its organization or name.”²⁴ Where the old companies are dissolved upon consolidation, the rights of creditors continue in force against the consolidated company in equity against the assets of the constituent companies in the hands of the consolidated company. Creditors have no right to prevent a consolidation or combination of corporations, but they cannot, by this action, be deprived of any of their rights or remedies against the constituent companies.

²⁴ *Indianapolis, etc., Ry. Co. v. Jones*, 29 Ind. 465.

CHAPTER VIII

ULTRA VIRES ACTS

§ 72. **Definition and Discussion of Doctrine.** The term *ultra vires* is used to express the action of a corporation in excess of or beyond the powers conferred, either expressly or impliedly, upon it by its charter. The existence of a legal right or cause of action as resulting from the *ultra vires* act is the essential question involved. There are two doctrines followed by the courts, one, known as the strict rule or doctrine of *ultra vires*, viz, that all acts of the corporation not within the powers conferred upon it or reasonably implied from its charter are absolutely null and void. The other rule or doctrine is known as the liberal one, and this holds that *ultra vires* acts, so far as their legal effect is concerned, are not absolutely null and void, but merely voidable. When an *ultra vires* act is spoken of as beyond the powers of the corporation, it must be remembered that the word power is used in the sense of legal authority or right and not of mere capacity. In this sense a corporation has no power to perform any act which is outside or in excess of the authority conferred upon it or reasonably implied from its charter, but, like a natural person, it has the capacity or the ability to perform many acts which are unauthorized, some of which may be actually wrongful or positively criminal. A natural person may be prohibited by law from committing the crime of murder. The act is in excess of or beyond his lawful powers, but the prohibition does not prevent the commission of many crimes of this nature.

As illustrative of this idea, a New York case can be read with interest and profit, where Chief Justice Comstock said:

“But such, I apprehend, is not the nature of these bodies; like natural persons, they can overleap the legal and moral restraints imposed upon them: In other words, they are

capable of doing wrong. To say that a corporation has no right to do unauthorized acts, is only to put forth a very plain truism; but to say that such bodies have no power or capacity to err, is to impute to them an excellence which does not belong to any created existences with which we are acquainted. The distinction between power and right is no more to be lost sight of in respect to artificial than in respect to natural persons. . . . One of the sources of error, in reasoning upon legal as well as other questions, is exactness in the use of language, or perhaps in the imperfectness of language to express the varieties of thought. It is a self-evident truth, that a natural person cannot exceed the powers which belong to his nature. In this proposition, we use words in their literal and exact sense. In the same sense, it is a truth, equally evident, that a corporation cannot exceed its powers; but this is only asserting that it cannot exercise attributes which it does not possess. As an impersonal being, it cannot experience religious emotion, nor feel the moral sentiments. Corporations are said to be clothed with certain powers enumerated in their charters or incidental to those which are enumerated, and it is also said, they cannot exceed those powers; therefore it has been urged, that all attempts to do so are simply nugatory. The premises are correct, when properly understood; but the conclusion is false, because the premises are misinterpreted. When we speak of the powers of a corporation, the term only expresses the privileges and franchises which are bestowed in the charter; and when we say it cannot exercise other powers, the just meaning of the language is, that as the attempt to do so is without authority of law, the performance of unauthorized acts is a usurpation, which may be a wrong to the State, or, perhaps, to the shareholders. But the usurpation is possible. In the same sense natural persons are under the restraints of law, but they may transgress the law, and when they do so, they are responsible for their acts. From this consequence, corporations are not, in my judgment, wholly exempt."¹

An *ultra vires* act is not necessarily regarded as not being in all cases the act of the corporation. Where real property has been acquired contrary to law by it, the general rule obtains that the title passes none the less. A

¹ Bissell v. Michigan Southern R. R. Co., etc., 22 N. Y. 259.

corporation may commit an offense contrary to express statutory provision for which it may be punished. A contract in excess of the powers of a corporation may be made by it, but this may still be enforced under the liberal rule relating to *ultra vires* acts.

§ 73. **Misapplication of Term (Ultra Vires).** In this connection the doctrine of special and general capacities of a corporation, as discussed in section 52, should be referred to. It is not necessary to repeat it here. The decisions upon the subject of *ultra vires* are many, confusing, and conflicting. No general rule can be stated which will be of assistance in positively and definitely determining the answer to the essential question, viz, the legal rights following or resulting from the doing of an *ultra vires* act by a corporation. It will be found upon investigation that in many cases the decision turns upon the parties complaining, whether the State, taking cognizance of a violation of its prohibitions or grants, or private persons engaged in litigation over a business transaction in which no other parties may be interested except themselves. The decision, again, may depend upon the person against whom the relief is sought in the proceeding which involves the legal effect of the *ultra vires* act; and, again, the decision may turn upon the relief sought, whether a forfeiture of the charter of the corporation, the enforcement of a contract, or the enforcement of their rights claimed to exist by reason of the act done in excess of the corporate powers.

The confusion in the authorities upon this whole general topic is manifest from an examination of them, and much of it has arisen from a misapprehension of the true limits and application of the doctrine of *ultra vires*. Cases are to be found where acts which require the consent of the stockholders to make them binding have been done without such consent, and these are spoken of as *ultra vires* acts, when in truth they are mere violations of the general law of agency. Such acts might be beyond the powers of the managing officers of the corporation, but would not be beyond or in excess of the powers of the corporation itself.

Again, cases are to be found in which directory provisions of the charter have prescribed that certain acts shall be done in a certain manner and these acts have been performed without observing the required formalities. These have been referred to as *ultra vires* acts, when it is apparent that in the absence of any intention on the part of the legislature to make such provisions mandatory or to impose penalties for their non-observance, they are mere irregularities and do not seriously affect the transaction. There are also acts which are forbidden by statute or common law, or against good morals or public policy which are classed as *ultra vires* acts. The better authorities treat these cases as governed by the same principles of law controlling an individual and hold the act or contract unenforceable, not because it is *ultra vires* merely, but because it is positively unlawful.

§ 74. **Classes of Ultra Vires Acts.** To clarify the subject as much as possible, acts stated to be *ultra vires* by the authorities may be classified into acts in excess of the corporate powers, as conferred by the charter of the corporation expressly, or by reasonable implication. To this class alone, in the proper sense of the term *ultra vires*, can this character be properly ascribed. Another class of acts termed *ultra vires* by some authorities, but which are not in the strict sense of the word, are those where the corporation is authorized to exercise powers by and through the consent of the stockholders, but which the corporation has done without this consent. Corporations may be also authorized to exercise certain powers for designated purposes. The power is, however, exercised for a different purpose or in excess of the designated power. There is clearly here a distinction between a want of power and a misuse of power. And, finally, there are also corporate acts which are valid if done in a certain manner by the corporation, but otherwise not. Here there is a clear distinction between a want of power and a lack of necessary formality in the execution of that power. Using the term *ultra vires* in its proper sense, acts of the last three classes

named cannot be regarded as coming within the term, although many authorities regard some or all of them of this character.

These distinctions have been made, however, in many cases, where the true concept of the term *ultra vires* is understood by the court. In a New Jersey case, Camden etc. Ry. v. May's Landing, 48 N. J. L. 530, in a dissenting opinion, but none the less valuable on this point, it was said:

"The indiscriminate use of this expression with respect to cases different in their nature and principles, has led to considerable confusion if not misapprehension. Where an act done by directors or officers is simply beyond the powers of the executive department of the corporation, the agency by which the corporation organizes its functions, and not of the corporation itself, it may be made valid and binding by the action of the board of directors or by the approval of the stockholders. Where the act done by the directors is not in excess of the powers of the corporation itself, but is simply an infringement upon the rights of other stockholders, it may be made binding upon the latter by ratification, or by consent implied by acquiescence. Where the infirmity of the act does not consist in a want of corporate power to do it, but in the disregard of formalities prescribed, it may or may not be valid as to third persons dealing *bona fide* with the corporation, according to the nature of the formalities not observed or the consequences the legislature has imposed upon non-observance. These are all cases depending upon legal principles not peculiarly applicable to corporations, and the use of the phrase *ultra vires* tends to confusion and misapprehension. In its legitimate use, the expression *ultra vires* should be applied only to such acts as are beyond the powers of the corporation itself."

§ 75. The Strict Rule and Its Reasons. The strict rule of *ultra vires* has already been briefly stated. The rights of different parties may be involved in the act. The act may be one in violation of the terms of its charter and where the State elects to take cognizance of it and punish the corporation for the use of powers not granted. The

right of the State to proceed against the corporation in these cases is plain. The rights of innocent third parties may be and are frequently also involved in the same transaction, and an effort to render substantial justice to the individual, and at the same time follow with logical consistency the rule that a corporation can exercise only those powers conferred upon it by its charter directly or by reasonable implication, leads to hopeless confusion in the cases. The strict rule of *ultra vires*, viz, that no legal results follow from the doing of the act of the corporation in excess of its powers, is followed with more strictness by the English cases and the Federal courts in this country than in many other jurisdictions. Thompson on Corporations, applying the rule to contracts, states it as follows:

“A contract of a corporation which is either unauthorized by or in violation of its charter or governing statutes, or which is entirely outside the scope of the powers of its creation, is void in the sense of being no contract at all, because of the want of power in the corporation to enter into it. That such a contract will not be enforced by any species of action in a court of justice, that being void *ab initio* (from the beginning), it cannot be made good by ratification or by any succession of renewals, and that no performance on either side can give validity to it so as to give a party to the contract any right of action upon it.”²

The reasons upon which the strict rule of *ultra vires* rests were concisely and clearly stated by Justice Gray in a case in the Supreme Court of the United States:³

“The reason why a corporation is not liable upon a contract *ultra vires*, that is to say, beyond the powers conferred upon it by the legislature, and varying from the objects of its creation, as declared in the law of its organization, are: (1) The interest of the public that the corporation shall not transcend the powers granted; (2) The interest of the stockholders that the capital shall not be subjected to the risk of enterprises not contemplated by the

² Thompson on Private Corporations, § 5355.

³ Pittsburgh, etc., R. R. Co. v. Keokuk, etc., Bridge Co., 131 U. S. 371.

charter, and therefore not authorized by the stockholders in subscribing for stock; (3) The obligation of everyone entering into a contract with a corporation to take notice of the legal limits of its powers."

And in an Iowa case, *Lucas v. White Line, etc. Co.*, 70 Iowa, 541, the court said, referring to the strict rule and some modifications:

"Corporations and officers do not always keep within their powers, and the application of the doctrine of *ultra vires* is often attended with very perplexing questions. By the application of a few plain rules, however, we may readily reach the proper answer to the questions involved in the case: (1) Every person dealing with a corporation is charged with knowledge of its powers as set out in its recorded articles of incorporation; (2) Where a corporation exercises power not given by its charter it violates the law of its organization, and may be proceeded against by the State through its attorney-general, as provided by the statute, and the unanimous consent of all the stockholders can not make illegal acts valid. The State has the right to interfere in such cases; (3) Where a third party makes with the officers of a corporation an illegal contract beyond the powers of a corporation, as shown by its charter, such third party can not recover; because he acts with knowledge that the officers have exceeded their powers, and between him and the corporation or its stockholders no amount of ratification by those unauthorized to make the contract will make it valid; (4) Where the officers of a corporation make a contract with third parties in regard to matters apparently within their corporate powers, but which, upon the proof of extrinsic facts of which the parties had no notice, lie beyond their powers, the corporation must be held, unless it may avoid liability by taking timely steps to prevent loss or damage to such third parties; for in such cases the third party is innocent, and the corporation or stockholders less innocent for having selected officers not worthy of the trust reposed in them."

§ 76. The Liberal Rule. Under the operation of the strict rule commonly followed by the English and Federal courts, an *ultra vires* act is treated as a nullity. On the other hand, a great many authorities in the States, while

acquiescing in the general doctrine that the corporation cannot act as a matter of theory in excess of its powers, and conceding that an *ultra vires* contract as such cannot be enforced, adhere to the view that it is not a nullity, but merely voidable and may be the basis of an estoppel by direct act or acquiescence; or they proceed upon the general doctrine that while they will not lend their aid to further promote or enforce an *ultra vires* transaction, they will not permit a party who has obtained a benefit thereby to interpose *ultra vires* as a defense. In other words, they attempt to do substantial justice, even though in so doing they may indirectly enforce an *ultra vires* act. Stated concisely, this doctrine may be summed up in a definition of the liberal rule, that an *ultra vires* act is not void but merely voidable when the application of the strict rule would not advance justice, but, on the contrary, would accomplish a legal wrong. It might be said, in connection with a discussion of the two rules, that the strict rule is applied to public corporations in all its severity, and its original use in respect to private corporations by the English decisions followed from its existence and its application against corporations of the character noted. For equitable reasons, it would appear that the liberal rule is the one to be applied in all cases involving private corporations. In the transaction of business by a public corporation, the interests of the public from the corporate standpoint alone are involved. Private corporations, on the other hand, are private enterprises employing personal and private capital, and only in exceptional cases involving, in the conduct of their business, the interests of the public.

§ 77. Effect of Ultra Vires Contracts. It is impossible to lay down any general rules regarding the enforceability of *ultra vires* contracts which would apply in all cases or be recognized in all courts. Where the liberal *ultra vires* rule is followed, the facts of a particular case determine the rights and equities of the parties, and even in those courts where the strict rule controls, decisions are rendered which modify materially its application. The general

results of all of the authorities may be summed up substantially in the following general propositions classified, as will be noted, upon the extent to which the *ultra vires* act has proceeded.

Executed on Both Sides. Where an *ultra vires* contract has been entered into and fully performed on both sides, the courts, without exception, hold that neither party can maintain an action to set aside the transaction or to recover the consideration that has been paid. The parties will be left in *statu quo*, and this rule is followed in those jurisdictions in which the strict doctrine of *ultra vires* is followed as well as in those jurisdictions where the contrary holding prevails. "The executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith so require."⁴

Executory on Both Sides. An *ultra vires* contract executory on both sides is void and cannot be enforced in any jurisdiction, for courts will not lend their assistance to enforce a void contract. This rule applies, however, only to those contracts which are clearly *ultra vires*. Where it is within the apparent scope of the corporate powers and *ultra vires* because of outside facts peculiarly within the knowledge of the corporation and without the knowledge of the other party to the transaction, the courts have frequently held the corporation estopped to deny its power to enter into a particular contract.

Partially Executed. If the *ultra vires* contract has been executed wholly or partially by both or one of the parties, the weight of authority in the State courts is to the effect that the party receiving benefits is estopped to assert the claim that the corporation had no authority to make the contract; and while the contract itself may not be directly enforced, the one who has, in good faith, parted with value or suffered damage in reliance upon it, will not be estopped to obtain relief by recovering what he has parted with or its value. In the jurisdictions where the strict rule of *ultra vires* obtains, it is held that under the circumstances

⁴ *Parish v. Wheeler*, 22 N. Y. 494.

noted above, while the contract itself will not be enforced because the corporation was incapable of making it, yet the one parting with an advantage or property will be permitted to recover in an action quasi *ex-contractu* the money paid or loaned or the value of the property delivered or services rendered under and pursuant to the contract. In a leading case in the Supreme Court of the United States,⁵ the court reiterated its uniform holding of the strict rule of *ultra vires*, and held that the contract between the two corporations, in order to bind either of them, must be within the corporate powers of both. That a contract beyond the powers conferred upon a corporation by the legislature is not voidable only, but wholly void. It cannot be ratified by either party. No performance on either side can give the unlawful contract any validity nor be the foundation of any right of action upon it. And, further, that neither the corporation nor the other parties to the contract can be estopped by assent to it or by acting upon it to show that it was prohibited. But the court, in the course of its decision, after reviewing many authorities, said:

“A contract *ultra vires* being unlawful and void, not because it is in itself immoral, but because the corporation by the law of its creation is incapable of making it, the courts, while refusing to maintain any action upon the unlawful contract have always striven to do justice between the parties so far as it could be done consistently with adherence to law by permitting property or money parted with on the faith of the unlawful contract, to be recovered back, or compensation to be made for it. In such case, however, the action is not maintained upon the unlawful contract, nor according to its terms; but on an implied contract of the defendant to return, or failing to do that, to make compensation for, property or money which it has no right to retain. To maintain such an action is not to affirm, but to disaffirm, the unlawful contract.”

And in an earlier case, *Salt Lake v. Hollister* (118 U. S. 256), the same court stated that

⁵ *Central Transportation Company v. Pullman Palace Car Co.*, 139 U. S. 24.

“In cases of contracts upon which corporations could not be sued because they were *ultra vires*, the courts have gone a long way to enable parties who had parted with property or money on the faith of such contracts to obtain justice by the recovery of the property or the money specifically or as money had and received to the plaintiff's use.”

Many cases will be found referred to in the Central Transportation Company case above cited and upholding the equitable doctrine there stated.

The State courts also generally hold that there exists an obligation, even where the corporation repudiates an *ultra vires* act, to restore what it has received under the contract, and the same is true of the other party to it. “However the contractual power of the corporation may be limited under its charter, there is no limitation of its power to make restitution to the other party whose money or property it has obtained through an unauthorized contract; nor, as a corporation, is it exempt from the common obligation to do justice which binds individuals, for this duty rests upon all persons alike, whether natural or artificial.”⁶

If a corporation obtains money through an *ultra vires* act and uses this money to pay existing and valid indebtedness, the person from whom the money was obtained is deemed in equity to be subrogated to the rights of the creditors of the corporation whose claims were paid thereby.

Retention of Benefits; Estoppel. In holding that an *ultra vires* contract can be enforced, the courts following the liberal rule of *ultra vires* generally base their decision upon the fact that by reason of part performance one or the other of the parties has received and retains benefits under the contract, and that so long as the benefits are retained no claim can be made that one or both of the parties had no power to make the contract. Chief Justice Gilfillan, in a Minnesota case, said:

“There are few rules better settled or more strongly supported by authority with fewer exceptions in this country,

⁶ The Manchester, etc., R. R. Co. v. Concord R. Co., 66 New Hamp. 100.

that when a contract by a private corporation, which is otherwise unobjectionable, has been performed on one side, the party that has received and retains the benefit of such performance, shall not be permitted to evade performance on the ground that the contract was in excess of the purposes for which the company was created. The rule may not be strictly logical but it prevents a good deal of injustice.'"⁷

And in a late Wisconsin case, *Lewis v. American etc. Association*, 98 Wis., 203, the court said:

"It is well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract in question has been in good faith fully performed by the other party and the corporation has had the full benefit of the performance of the contract. Much less will the claim that the transaction was *ultra vires* be allowed as a ground for rescinding the contract and restoring to the complaining party on that ground the property or funds with which he has parted after he has had the benefit of full performance of the contract by the other party; and, in general, the plea of *ultra vires* will not be allowed to prevail, whether interposed for or against a corporation when it will not advance justice but, on the contrary, will accomplish a legal wrong."

§ 78. Acquiescence in and Ratification of Ultra Vires Acts. To entitle a stockholder to relief against the results of the *ultra vires* acts by a corporation, he must act promptly or he will be bound by his laches. Corporate members may restrain, in the proper proceedings, *ultra vires* acts when still executory; but relief will not be granted in the majority of jurisdictions when the acts complained of have been either wholly or partially executed on one or both sides, unless some great public interest is involved.

§ 79. Rule as to Negotiable Paper. In this country private corporations organized for pecuniary purposes have the implied power, unless prohibited by their charters, to execute negotiable instruments when within their proper

⁷ *Seymour v. Guaranty, etc., Society*, 54 Minn. 147.

corporate purposes. If negotiable paper is issued in excess of their authorized powers as between the original parties, it will be void when the transaction was affected by notice of its *ultra vires* character. An innocent purchaser for value is usually protected, however, as he has a right to presume that the paper was made or endorsed in the usual course of business and was binding upon the corporation. A different rule obtains, however, where an express statutory provision prohibits the issue of negotiable paper.

§ 80. **Result of Ultra Vires Acts.** Where a corporation does an *ultra vires* act or one in excess of and beyond its charter powers, it clearly has violated an express or implied prohibition of the State creating it and granting or withholding corporate powers and capacities. The State unquestionably has the right to maintain proceedings for the forfeiture of that charter and the dissolution of the corporation. This right belongs, however, to the State alone, as a corporation derives none of its powers from third parties, even those which may be involved in the *ultra vires* act. A forfeiture of the charter of the corporation deprives it of its legal existence. It is the equivalent of capital punishment in the case of a natural person. It is only in unusual cases and those where there has been a persistent and defiant violation of charter provisions that this extreme punishment is sought even by the State to be inflicted upon the offender. The rule was well stated in a case brought under the New York laws for a violation of statutes relative to the organization and conduct of trusts.⁸ The court here said:

“To justify forfeiture of corporate existence a State as prosecutor must show, on the part of the corporation accused, some sin against the law of its being which has produced or tends to produce injury to the public. A transgression must not be merely formal or incidental, but material and serious and such as to harm or menace the public welfare; for the State does not and should not concern itself with the quarrels of private litigants. It furnishes for them

⁸ *People v. North River Sugar Refining Co.*, 121 N. Y. 582.

sufficient courts and remedies, but intervenes as a party only when some public interest requires its action."

And in a Minnesota case,⁹ the court said:

"Courts always proceed with great caution in declaring a forfeiture of franchises, and require the prosecutor seeking the forfeiture to bring the case clearly within the rules entitling him to exact so severe a penalty. . . . Hence, if they engage in any business not authorized by the statute, it is *ultra vires*, or in excess of their powers, but not a usurpation of franchises not granted, nor necessarily a misuser of those granted. Acts in excess of power may undoubtedly be carried so far as to amount to a misuser of the franchise to be a corporation and a ground for its forfeiture. How far it must go to amount to this the courts have wisely never attempted to define, except in very general terms, preferring the safer course of adopting a gradual process of judicial inclusion and exclusion as the cases arise. But we think it may be safely stated as the general consensus of the authorities that, to constitute a misuser of the corporate franchise, such as to warrant its forfeiture, the *ultra vires* acts must be so substantial and continued as to amount to a clear violation of the condition upon which the franchise was granted, and so derange or destroy the business of the corporation that it no longer fulfills the end for which it was created. But, in case of excess of powers, it is only where some public mischief is done or threatened that the State, by the attorney-general, should interfere. If, as between the company and its stockholders, there is a wrongful application of the capital, or an illegal incurring of liabilities, it is for the stockholders to complain. If the company is entering into contracts *ultra vires*, to the prejudice of persons outside the corporation, such as creditors, it is for such persons to take steps to protect their interests. The mere fact that acts are *ultra vires* is not necessarily a ground for interference by the State, especially by *quo warranto* to forfeit the corporate franchises. It should also be borne in mind that acts *ultra vires* may justify interference on the part of the State by injunction to prohibit a continuance of the excess of powers which would not be sufficient ground for a forfeiture in proceedings in *quo warranto*."

⁹ State v. Minnesota Thresher Mfg. Co., 40 Minn. 213.

CHAPTER IX

LIABILITY FOR TORTS AND CRIMES

§ 81. **Common-Law Conception of Corporation.** The common-law conception of a corporation was that of an artificial person, invisible and intangible, with neither soul nor body and with no moral sense. Legally capable of exercising only the powers conferred, its capacity to commit either torts or crimes was necessarily denied. It was repeatedly adjudged that they could not be subjected in actions of trover, trespass, or disseizin; that they could not commit crimes nor be liable for torts, with few exceptions. The old idea of a corporation without a soul is more quaint than substantial, and the theory of the doctrine that a corporation, by its charter, could exercise only those powers beneficial in themselves is contrary to the modern and the common-sense idea, that if it is possible for a corporation to act from good motives, it can also act upon bad ones. They can intend to do evil as well as to do good. This is substantially the modern doctrine through the application of which corporations are held liable for their torts and subject to punishment for the commission of many criminal offenses. The law of private corporations, within the last half century, has been in progress of development, and has grown up from a few rules and maxims into a substantial body of law. Corporations have so multiplied and extended that they are connected with and in a great degree influence all the business transactions of the country and give character to some extent to society itself. Corporations, instead of being the soulless and unconscious beings of Lord Coke's times are the great motive powers of society, governing, regulating, and transacting its chief business affairs. They act not only upon pecuniary concerns, but as having conscience and motives, and to an almost unlimited extent they are entrusted with the benevolent and religious agencies

of the day and are constituted trustees and managers of large funds promotive of such objects.

§ 82. Liability for Torts. The development of the law respecting private corporations, in respect to the subject of this chapter, has progressed with its development along other lines, and it is now the settled rule that a corporation is liable in civil action for torts committed by its agents and servants the same as a natural person. When a corporate officer or agent acts within the apparent scope of his power or authority, the corporation is bound by his acts, and is liable to third parties who may have sustained damages by reason of them. For the unauthorized and unlawful tortious acts of its officers and agents, it is only liable when the corporation has subsequently ratified or adopted them. To create a liability for an unauthorized and unlawful act of the corporate officers and agents, it must appear that they were expressly directed to do the act, or that it was done in pursuance of general authority relative to the subject of it. Where the act is within the scope of the general powers of the corporation, its liability is not defeated by the fact that the corporate agents have assumed to do and have done that which the corporation itself could not rightfully do. A corporation may do wrong through its agents and be subjected to a liability for the consequences of that wrongful act. The modern doctrine holds that the liability extends to torts, involving a specific intent or the element of malice, as libel, fraud, malicious prosecution, or conspiracy.

Damages Recoverable. The commission of a tort may lead to the recovery of punitive damages by the one injured. It is now held that a corporation may be liable in punitive damages under the same circumstances as a natural person acting through an agent would be held. The decisions, however, are conflicting on the question of punitive damages, and some still hold that only actual damages can be recovered; others, that punitive damages will be allowed when the wrongful act of the agent was willful and intentional; and still others hold that punitive damages can

be recovered only when the wrongful act was done under the express direction of the corporation or afterwards ratified by it.

Motive and Intent as Elements. For many years the decisions made a distinction in determining the liability of the corporation for its acts or conduct, between those for which the actor is liable, independently of motive and which are injurious, and those the nature or character of which depends upon the motive, and which, apart from this, cannot be made a ground of liability. Many authorities have maintained that because a corporation was incapable of possessing motives or evidencing an intent, where the act involved these as an essential ground of recovery, that the corporation could not be held. The tendency of modern decisions is to ignore the distinctions as to corporations and to apply the same principles which are applied to natural persons acting under similar conditions. An early case in Connecticut is illustrative of this modern tendency.⁹ This was an action based on the provisions of the Connecticut statutes entitled "An Act to Prevent Vexatious Suits", and the court held that it was subjected to the same general principles as actions in a case for malicious prosecution at common law. The plaintiff alleged that the defendant, a corporation, without probable cause, with malicious intent, unjustly to vex, harass, embarrass, and trouble the plaintiff, had commenced, by writ of attachment, and prosecuted against him, a certain vexatious suit and action for fraudulent representations, to the injury of the bank. There was a motion for non-suit which was granted by the lower court but which was set aside on appeal. The question involved in this case was whether a corporation could act from malice, and therefore commence and prosecute a malicious or vexatious suit. This was decided in the affirmative by the appellate court, where this language was used:

"But after all, the objection to the remedy of this plaintiff against the bank in its corporate capacity is not so much

⁹ *Goodspeed v. Bank*, 22 Conn. 530.

that as a corporation it cannot be made responsible for torts committed by its directors, as that it cannot be subjected to that species of tort which essentially consists in motive and intention. The claim is, that, as a corporation is ideal only, it cannot act from malice, and, therefore, cannot commence and prosecute a malicious or vexatious suit. This syllogism, or reasoning, might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives, and act from motives, is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance, every day. And if they can have any motive, they can have a bad one; they can intend to do evil as well as to do good. If the act done is a corporate one, so must the motive and intention be."

As illustrating the tendency and holdings of courts on the questions suggested above, a few quotations will be instructive:

"A corporation is liable to the same extent and under the same conditions as a natural person for the consequences of its wrongful acts and will be held to respond in a civil action at the suit of an injured party for every grade and description of forcible, malicious, or negligent tort or wrong which it commits, however foreign to its nature or beyond its granted powers the wrongful transaction or act may be."¹⁰

"Corporations are liable for every wrong they commit, and in such cases the doctrine of *ultra vires* has no application. They are liable for the acts of their servants while such servants are engaged in the business of their principal in the same manner and to the same extent that individuals are liable under like circumstances. An action may be maintained against a corporation for its malicious or negligent tort, however foreign they may be to the object of its creation or beyond its granted powers. It may be sued for assault and battery, for fraud and deceit, for false imprisonment, for malicious prosecution, for nuisance and for libel."¹¹

¹⁰ New York, etc., R. R. Co. v. Schuyler, 34 N. Y. 30.

¹¹ National Bank v. Graham, 100 U. S. 699.

§ 83. **Commission of Crime.** In general, a corporation may be responsible for omissions to perform specific duties imposed by law. They are subject to punishment for some acts of misfeasance, but not ordinarily for crimes which involve a mental operation or the element of personal violence. There are also some crimes which a corporation, from its intangible nature, can not commit. A corporation may also be guilty of contempt of court and punished the same as a natural person. Bishop on Criminal Law, Sec. 417, states their liability as follows:

“A corporation cannot, in its corporate capacity, commit a crime by an act in the fullest sense *ultra vires* and contrary to its nature but within the sphere of its corporate capacity and to an undefined extent beyond. Whenever it assumes to act as a corporation it has the same capabilities of criminal intent and of act, in other words, of crime, as an individual must sustain to the thing of like relation.”

There exists at the present time no distinction between the acts of misfeasance and of nonfeasance, at least where no criminal intent is involved.

The crimes involving criminal intent, and which from their nature a corporation is incapable of doing, are, among others, murder, larceny, and assault and battery, although a corporation may be liable civilly for punitive damages caused by an assault and battery, or a malicious prosecution and other torts involving intent. In keeping with these rules of liability, a corporation has been held subject to indictment for criminal libel, for keeping a disorderly house, obstructing navigation, for committing a public nuisance, for Sabbath breaking, and for usury.

CHAPTER X

MEMBERSHIP IN CORPORATIONS

§ 84. General Statement. The division of corporations into stock and non-stock will be considered for the purposes of this chapter. A stock corporation is one having shares of capital stock of the par value and to the amount designated in its charter. A non-stock corporation is one having no capital stock. The former are usually organized for the purpose of the pecuniary gain and advantage of its members. The latter are usually formed for the purpose of advancing and promoting, in behalf of its members and others, other objects than the financial benefit or advantage of its members. The methods of acquiring membership and the loss of that membership when acquired are essentially different in the two classes of corporations.

§ 85. Non-Stock Corporations. The charter, or the by-laws, of a non-stock corporation, determines the method by which membership must be acquired. Admission of members is usually under the absolute control of the corporation, subject to restrictions, if any, found in the laws of the State or in the articles of incorporation. Persons may become members either by joining in the original organization of the corporation, or, subsequently, upon being admitted to membership in accordance with its regulations, usually consisting of the requirements of an application for membership and a vote of approval by existing members. Membership in a non-stock corporation, it will be seen, is determined, not by the ownership of an interest in the corporation, or even the possession of the required qualifications, but upon the approval by the members of an existing corporation to admit to membership.

§ 86. Stock Corporations. Membership in a corporation having shares of capital stock is acquired through the

ownership of one or more of the aliquot parts into which the capital stock of the corporation is divided. The personal approval of the existing members of a corporation is not necessary nor the possession of any personal qualification. If an individual becomes the owner, in any legitimate way, of one or more of the aliquot shares into which the capital stock is divided, he thereby becomes a member of the corporation, although his personality may be distasteful or obnoxious to every other member of that corporation. He is a member in the full legal sense of the word and entitled to all of the rights which attach to the ownership by him of his proportionate part of the capital stock of the corporation. His interest in the corporation is evidenced, usually, by what is termed a certificate of stock, though its issue by the corporation and possession by the member is not necessary to constitute that relation. It is the ownership of an interest in the capital stock of the corporation that constitutes one a member. His name may appear on the books of the company as the owner of an interest, but this does not necessarily establish the relation. This subject will be discussed later in the chapter on capital stock. One may become an owner of the capital stock of a corporation by acquiring it through purchase or devise, by subscription to the shares of stock of the corporation, and through the operation of the doctrine of estoppel. The latter rule is applied where one, without owning shares of stock in a corporation, assumes the rights of membership and acts in accordance with that relation; holding himself out, in other words, to the public dealing with the corporation and with himself as a member of that corporation. The courts hold, where this condition exists, that in subsequent controversies or litigation arising from these acts, he will be estopped to assert his non-membership.

§ 87. Who Can Be Members. The relation existing between a corporation, the State, and its members, and between its members, is a contract one, and it follows that in the absence of statutory provisions only those who are capable of entering into a contract relation may become

members of a stock corporation. Infants may, however, acquire stock in a corporation, but this particular contract will be entered into subject to the principles of law controlling, in general, the contracts of those *non sui juris*. The right of affirmance or disaffirmance will exist upon attaining majority. The authorities are agreed that if an infant accepts the benefits of membership in a stock corporation he is also responsible for the liabilities following that relation and subject, therefore, to calls and assessments. Where the common law disability relating to married women prevails they are, even if of legal age, subject to the controlling principles of the law limiting their capacity to enter into contracts. In nearly all States, however, "Married Women Acts", so-called, have been passed removing the common-law disability, and in these States they are free, if of age, to enter into this particular contract relation as freely as other persons *sui juris*. They can become shareholders in stock corporations, entitled to the benefits and subject to the liabilities created through the existence of the relation. The right of one corporation to become a member of another stock corporation has already been discussed. The general rule may be repeated here, viz, that the legal right does not exist unless expressly conferred, the doctrine applying both to the acquisition of shares in another corporation as well as shares of its own stock. Trustees and others occupying a trust relation may become members of a stock corporation for the benefit of their *cestui que trust*. Statutory provisions exist in many States declaring the trustee under such circumstances to be merely a nominal legal owner of the shares, the trust estate constituting the true owner and in their absence this rule will still obtain.

§ 88. Loss of Membership. Membership in a stock corporation is lost by the transfer of the interest owned by the member to another. Membership in a non-stock corporation is lost by death, resignation or through expulsion, a resignation being the voluntary relinquishment or membership in a corporation, while expulsion is an involuntary,

loss of membership. In non-stock corporations the power of expulsion is determined by the constitution and by-laws of the association or the corporation, and the member must give his assent to by-laws regulating expulsion before they can become operative upon him, though acceptance of membership with knowledge of the by-laws is usually held by the courts to constitute an implied assent.

§ 89. Requisites to Legal Expulsion. An individual possesses both personal and property rights. The former including with others, life, liberty, health, and reputation. These personal rights are regarded by the courts as entitled to protection, and both the Federal and State constitutions abound in provisions insuring to the individual the possession and enjoyment of his fundamental personal rights. Expulsion from a non-stock corporation may seriously affect or entirely destroy one of the most desirable and important of personal rights, viz, that of reputation. The courts, therefore, have universally held that before a member can be expelled from a non-stock corporation, certain and essential steps must be taken. One cannot be deprived of personal rights without due process of law. And despite by-laws or charter provisions to the contrary, to constitute a legal expulsion, the one expelled must have had notice of the proceeding looking to expulsion; the corporation must have considered the question of expulsion at a meeting regularly had or specially called for that purpose; due formality must have been observed in the proceedings, and finally there must have been a formal conviction resulting from the affirmative action of the required number of members. Discussing these essentials somewhat briefly, the person charged with an offense, the ground of an attempted expulsion, must have notice, not only of the offense with which he is charged, but also of the meeting at which the charge is to be considered by the corporation. He must be given a reasonable opportunity to appear and defend himself against the charges. The meeting at which the charges are considered and the vote of expulsion taken must be held in accordance with charter provisions or the requirements

of a by-law controlling the calling of meetings of the corporation and the business which could be legally transacted at the meeting. The proceedings involving the expulsion must be conducted according to the formalities required by the charter or by-laws. There must be, further, a consideration of the charge and the evidence offered sustaining it in connection with the formal vote of expulsion. The courts hold that there must be proof of the offense charged, even if the defendant fails to appear. In the case of non-stock corporations, where the essentials of a legal expulsion have been carefully observed, the courts, as a rule, will not interfere, unless the rule or by-law authorizing the expulsion was in itself immoral, contrary to public policy or in contravention of the law of the land; or unless the by-law was not observed, or some of the essentials noted above were omitted; and, finally, unless there was bad faith exercised by the corporation and its members in arriving at a decision. The courts will interfere, without doubt where the judgment of expulsion was made without notice and opportunity to be heard. The fundamental principles to be observed in connection with the subject of expulsion of a member from a non-stock corporation are that the personal rights of the individual are protected by constitutional provisions equally with his property rights, and that one cannot be deprived of either without due process of law, and due process of law includes, as its most necessary condition, the giving of notice to one whose rights are to be affected by a proceeding, and affording him, in a court or body of competent jurisdiction, a reasonable opportunity to appear, if he so desires, and protect these rights.

In considering the question of whether an offense prescribed by a by-law as warranting expulsion will, as a matter of law, afford a legal ground for expulsion, many decisions have considered the character of the offense, some holding that only offenses of an infamous character; or, in other words, those which are indictable under the criminal codes of the State, will afford ground for expulsion. Other decisions hold that if a member of the corporation commit

an offense which in and of itself is not indictable or of an infamous character, but which is against the party's duty to the corporation as a member of it, the corporation is warranted in proceeding in a legal manner to expel the member.

§ 90. Voluntary Withdrawals. *In Non-Stock Corporations.* In the case of non-stock corporations, the interests of the members in the property of the corporation and their liabilities to corporate creditors, are the principal questions involved. The general rule seems to obtain that by a voluntary withdrawal from a non-stock corporation, the member loses his right to claim any interest in the property of the corporation. He is deemed to have abandoned his property rights. His personal liability of a member in a non-stock corporation for the corporate debts will be considered in a later chapter.

In Stock Corporations. In a stock corporation, upon transfer of ownership and consequent loss of membership, the questions involved are somewhat different. They include the right of the corporation to a lien upon his stock for debts due the corporation, the question of unpaid subscriptions to the capital stock and the right of other shareholders to require him to meet his proportion of the corporate liabilities. These questions will be considered in a subsequent chapter. Upon sale and transfer of the stockholder's interest in the corporation, he is presumed to have received from the purchaser of his interest the equivalent monetary value of that interest in the corporate property.

CHAPTER XI

RIGHTS OF CORPORATE MEMBERS

The powers or rights of corporate members may be somewhat roughly divided into ordinary and extraordinary. Extraordinary rights exercised by members are those which change the original contract of membership and include the power to amend the charter of the corporation; to increase or reduce its capital stock; to sell or lease the entire corporate property, and to consolidate or merge the corporation with others. The courts hold that these powers of the corporation must be exercised, when authorized by law, originally by the stockholders or members of the corporation, and cannot be exercised by the directors without express authority from them.

The ordinary rights or powers appertaining to corporate membership consist of the right to meet and elect directors; to participate in the proceedings at stockholders' meetings; to accept or reject applications for admission, in case of non-stock corporations; to prescribe by-laws; to inspect the corporate books; to participate in the net profits of the corporate business through the payment of dividends; to insist that the corporate property and funds shall not be diverted from their original purpose; to restrain the corporation from doing acts *ultra vires*; to hold officers accountable for their actions in the management of the corporate business; and, in extreme cases, to defend or bring suits or actions at law for and on behalf of the corporation. These powers were indicated in a decision where the judge said:

“The rights of stockholders are: to meet at stockholders' meetings; to participate in the profits of the business; and to require that the corporate property and funds shall not be diverted from their original purpose. If the com-

pany becomes insolvent, it is the right of the stockholders to have the property applied to the payment of its debts. I do not know of any other rights except incidental ones, subsidiary and auxiliary to these. Of course, the stockholder has, ordinarily, the right to a certificate for his stock; to transfer it on the company's books, and to inspect these books. For the invasion of these rights by the officers of the company, he may sue at law or in equity, according to the facts in the case."¹

A textbook writer has divided the rights of members into individual and collective. The former including a right to a certificate of shares; to transfer his shares; to vote at the stockholders' meeting; to inspect the books of the company; to dividends after the same are declared; and the latter including the right to interfere with corporate management. The more important of these membership rights will be briefly considered in the following sections.

§ 91. Right to a Certificate of Stock. In stock corporations the relation of membership is based upon the ownership of one or more of the aliquot parts into which the capital stock of the corporation is divided. To establish this relation, the possession of a so-called certificate of stock is not necessary, but it is customary for the corporation to issue, as *prima facie* evidence of ownership, a written acknowledgment, under the seal of the corporation and executed by its proper officers, of the ownership of the individual named in the capital stock of the corporation. Every member of a stock corporation is entitled, as a matter of legal right, to this written acknowledgment, and if the corporation refuses to issue it, it has been held that its refusal may be treated as tantamount to a conversion of the shares.

§ 92. Right to Participate in the Management of the Corporation. The right of a member in a stock corporation to share in the general management and conduct of its affairs is limited to participation in stockholders' meetings and to the election of a board of directors or managing

¹ *Forbes v. Memphis, etc. R. R.*, 2 Woods C. C. 323.

officers in whom is vested, usually, the entire power of the direct management of the business affairs of the corporation.

§ 93. Rights in Corporate Property. Incidental to the subject of the right to actively participate in the management of the business of the corporation, the legal doctrine might be stated that the shareholder has no legal title to the property or profits in a corporation until a dividend has been declared or a division made. His interest is merely an inchoate, indivisible, and intangible one. The title to all corporate property is vested in the legal person, viz, the corporation. A stockholder, merely because he may own one-half of the capital stock of a corporation, cannot claim or assert any rights of ownership over one-half of the corporate property. His rights only become tangible and fixed in case of the dissolution of the corporation and a division of its property; or when corporate profits have been formally declared in the form of dividends.

§ 94. Right to Inspect Records. The right existed at common law in every member of a corporation to inspect the books and records of a corporation, at a convenient time and place from the viewpoint of the corporation, and for a proper purpose, either in person or by his properly authorized representative. Many States have passed statutes declaring, as a matter of law, this common-law right. The Minnesota provision is illustrative of acts of this class.²

After provision for the keeping of certain accurate and complete records of corporate proceedings, it declares that "All such books and records shall, at all reasonable times and for all proper purposes, be open to the inspection of every stockholder." In Alabama it is provided that "the stockholders of all private corporations shall have the right of access to or inspection and examination of the books of records and papers of the corporation at reasonable and proper times." The wording of the statute in a particular State will determine the exact right of a corporate member,

² Rev. Laws of Minnesota, 1905, § 2869.

for, as will be noted in the statement of the common-law rule, this is not an absolute but a limited one.

§ 95. **Right to Inspection.** The fundamental limitations upon the right of inspection on the part of the stockholder are that it shall be exercised at a convenient time and place and for other proper purposes. Even where, by statute, the absolute right is apparently given, certain inherent limitations necessarily exist. These would include an exercise of the right within business hours and at the office of the corporation. The right, further, cannot be exercised in an unreasonable manner, considered from the standpoint of the corporation in the transaction of its business. The right cannot be exercised by the member in such a manner as to prevent the corporation from transacting its business in the usual manner. A corporation with many thousand stockholders—not an unusual condition at the present time—might be entirely prevented from transacting its business if each one of these insisted upon his right to inspect certain corporate books and records, the daily use and keeping of which is absolutely necessary to the carrying on of its business. In the absence of statutes limiting the purpose for which corporate records may be inspected, it has been held that the right is not to be exercised to gratify curiosity or for speculative purposes, but in good faith and for a specific honest purpose and where there is a particular matter in dispute involving and affecting materially the rights of the stockholder. It cannot be exercised at the caprice of the curious and the suspicious. The courts also have held that the right cannot be exercised on account of a general dissatisfaction on the part of the stockholder with the management of the enterprise based upon a vague belief that it is being dishonestly or inefficiently managed. The stockholder has, in general, however, the right to inform himself of all corporate transactions, the right to be exercised under the essential conditions noted above. On this point a New Jersey case³ held as follows:

“To say that they have the right, but that it can be

³ *Huyler v. Cragin Cattle Company*, 40 N. J. Eq. 392.

enforced only when they have ascertained in some way without the books that their affairs have been mismanaged, or that their interests are in danger, is practically to deny the right in the majority of cases. Oftentimes frauds are discoverable only by examination of the books by an expert accountant. The books are not the private property of the directors or managers, but are the records of their transactions as trustees for the stockholders."

A further limitation exists upon the right of inspection in this, that even where the stockholders are given by statute the right, yet it does not extend to an inspection of the books or records of the board of directors of the corporation or subcommittees of managing boards. The demand for inspection must be made by the member upon the proper officer in charge of the books or records an examination of which is desired, and the demand must also state, specifically, the particular books or records to be inspected. A general demand for inspection of all the books and records of the corporation is too broad and indefinite.

Remedy for Wrongful Refusal. If, after a proper demand has been made by a stockholder for an inspection of the books and records of a corporation, and upon the proper officer having legal charge or custody of them, the right of inspection is refused, the stockholder has the election of several remedies against the corporation. He can sue it and recover damages sustained, if by competent evidence it appears he has suffered any; he can petition for a writ of *mandamus* to issue against the officer having charge and custody of the books and records in question; or, in those States where a statutory penalty is provided for a denial of the right, this can be recovered.

§ 96. **Right to Receive Dividends.** It has already been stated that the title to all the corporate property is vested in the corporation and that no stockholder or member has a definite, tangible, or divisible interest before the corporation is dissolved or until a share in the net profits of the corporation has been declared in the form of dividends. The right to receive dividends, if any are earned, belongs

to every stockholder in a corporation organized for pecuniary purposes. A dividend has been defined as a "corporate profit set aside, declared and ordered by the proper corporate officers to be paid to the stockholders on demand or at a certain time." It is the general rule that members have no legal rights to dividends until officially declared, and that they can only be declared and paid out of the net earnings or profits of the corporate business. An implied prohibition, and in many States express, exists against the declaration and the payment of dividends from other sources than the net profits or earnings, for otherwise they may be paid out of the funds representing the capital stock of the corporation. The terms net earnings and profits necessarily have been the subject of many judicial decisions. "The words mean, what shall remain as the clear gain of any business venture after deducting the capital invested in the business, the expenses incurred in its conduct, and the losses sustained in its prosecution."⁴ Again, "profits of a company are not such sums as may remain after the payment of every debt, but are the excess of ordinary receipts over expenses properly chargeable to revenue account."⁵ Again, "Net earnings are properly the gross receipts, less the expense of operating the road or other business of the corporation. Interest on debts is paid out of what thus remains out of the net earnings; the remainder is the profit of the shareholder."⁶

Discretionary Power of Declaration. The profits of the corporation belong to the corporation. Stockholders have no right to share in them until a certain proportion has been officially declared by the directors as dividends. When the declaration has been made, the common rule seems to obtain that it then cannot be revoked and the corporate member can insist upon its payment if made out of the surplus or the net profits of the corporation. The declaration of dividends rests in the sound discretion of the board of directors or managing officers, and stockholders have no

⁴ *Park v. Granite, etc., Works*, 40 N. J. Eq. 114.

⁵ *Mills v. Northern, etc., Ry. Co.*, L. R., 5 Ch. App. 621.

⁶ *St. John v. Erie R. R.*, 10 Blatch. 271.

remedy in respect to their action on dividends so long as this discretion is exercised honestly and in furtherance of what the directors, acting upon their best judgment, deem the sound interests of the corporation. Members can complain only when this discretion is abused or the directors act fraudulently. The rule was well stated by the Supreme Court of the United States:⁷

“Money earned by a corporation remains the property of the corporation and does not become the property of the stockholders unless and until it is distributed among them by the corporation. The corporation may treat it and deal with it either as profits of its business or as an addition to its capital. Acting in good faith and for the best interests of all concerned, the corporation may distribute its earnings at once to the stockholders as income; or it may reserve part of the earnings of a prosperous year to make up a possible lack of profit in future years; or it may retain portions of its earnings and allow them to accumulate and then invest them in its own plant, so as to secure and increase the permanent value of its property. Which of these courses is to be pursued is to be determined by the directors with due regard to the conditions of the company's property and affairs as a whole; and, unless in case of fraud or bad faith on their part, their discretion in this respect can not be controlled by the courts, even at the suit of owners or preferred stock, entitled by express agreement with the corporation to dividends at a certain yearly rate in preference to the payment of any dividend on the common stock but dependent on the profits of each particular year as declared by the board of directors.”

Form of Dividends and to Whom Paid. It is within the discretion of the board of directors to determine, at the time of the declaration of a dividend, the manner of its payment, whether in cash, stock, bonds or scrip, or property. A dividend can be paid by any of the means suggested, the only limitation being that the funds or property of the corporation representing its capital stock cannot be distributed in the form of dividends. In stock corporations

⁷ Gibbons v. Mahon, 136 U. S. 549.

the universal rule prevails that the member whose name appears on the books of the company at the time designated in the declaration of the dividends, is entitled to receive it. The stock transfer books, except in special cases, determine absolutely the rights of parties in this respect, and the corporation is fully protected in paying dividends to the members then appearing upon its records.

§ 97. Right to Vote. This is also one of the ordinary rights of the member of a corporation. In a non-stock corporation each member is entitled to one vote, and this was the common law also in respect to the right of members in stock corporations. The rule, however, has obtained for many years that members of stock corporations are entitled in person or by proxy to that proportion of votes in stockholders' meetings represented by the number of shares appearing in their names upon the books of the company. In cases of dispute, only shareholders of record are entitled to vote, and the transfer books of the corporation are universally regarded as *prima facie* evidence of the right. In cases of transfer the vendor may exercise his right of voting until the vendee has completed the transaction by causing to be transferred upon the books of the company his name as the owner of the stock.

Cumulative Voting. As stated above, the common rule prevails at the present time that the shareholder is entitled to that number of votes corresponding with the number of shares appearing in his name upon the books of the corporation. The usual manner of casting these votes has been modified of recent years by custom, and also by statute in many cases, through the introduction of what is known as the cumulative system of voting. Unless this prevails, the power of the majority is absolute. They can elect the entire board of directors or managing officers. The minority interests, although representing, for illustration, 49 per cent of the capital stock, will be deprived of representation upon the board. To enable a minority interest to obtain representation, the system above has been introduced, and this, in effect, gives to the minority

shareholders the power to elect members of the board of directors by accumulating their votes on one or more candidates. To illustrate: Suppose there are five directors to be elected; the majority of shareholders have seven hundred votes, the minority three hundred. It is apparent that the majority can cast seven hundred for each of their five candidates. The minority, under the cumulative system, may multiply their entire number of votes by the number of directors to be chosen (three hundred times five) and cast the entire fifteen hundred votes for two candidates, thus assuring their election over two of the candidates of the majority.

§ 98. Rights of Stockholders over Corporate Action. Other rights of stockholders are to hold corporate officers accountable for their actions in the management of corporate property, and, in extreme cases, to defend and bring suits for the corporation. A quotation from a leading case decided by the Supreme Court of the United States, dealing with the exercise of these rights, will sufficiently and clearly state the law on the question involved:⁸

“Before an action can be maintained by the stockholder there must be shown: (1) Some action or threatened action of the directors or trustees which is beyond the authority conferred by the charter, or the law under which the company was organized; (2) such a fraudulent transaction, completed or threatened by them, either among themselves or with some other party, or with shareholders, as will result in serious injury to the company or the other shareholders; (3) that the directors, or a majority of them, are acting for their own interest in a manner destructive of the company, or the rights of the other shareholders; (4) that the majority of the shareholders are oppressively and illegally pursuing, in the name of the company, a course in violation of the rights of the other shareholders which can only be restrained by a court of equity; (5) it must also be made to appear that the complainant made an earnest effort to obtain redress at the hands of the directors and shareholders of the corporation, and that the ownership was vested in him at the time of the transactions of which

⁸ Hawes v. Oakland, 104 U. S. 450.

he complains, or was thereafter transferred to him by operation of law."

In restraining *ultra vires* acts, the court, in a New York case, said:⁹

"We do not question the right of stockholders to complain of any diversion of the capital and assets to purposes not authorized by the charter, and to arrest by suit an unauthorized course of dealing which results in such diversion. The powers of a court of equity may be put in motion at the instance of a single shareholder, if he can show that the corporation is employing its statutory powers for the accomplishment of purposes not within the scope of its institution."

And, on the points directly involved in this section the court, in the same case, said:

"In action by stockholders, which assail the acts of their directors or trustees, courts will not interfere unless the powers have been illegally or unconscientiously executed, or unless it be made to appear that the acts were fraudulent or collusive and destructive of the rights of the stockholders. Mere errors of judgment are not sufficient as grounds for equity interference; for the powers of those entrusted with corporate management are largely discretionary."

⁹ Leslie v. Lorillard, 110 N. Y. 519.

PRIVATE CORPORATIONS

PART III

CHAPTER XII

MEMBERSHIP LIABILITY

§ 99. Liability of Members of Stock Corporations. Membership liability may be broadly divided into that to the corporation, to other members, and to corporate creditors. Liability in case of stock corporations will be first considered.

To the Corporation. The articles of incorporation fix the amount of its capital stock, the number of shares into which it is divided and their par value. One of the contract obligations entered into at the time of the organization of the corporation is the agreement between the members and the corporation that they will pay into the corporate treasury, for the purpose of carrying on its business and for the payment of corporate debts, in money or in money's worth the full par value of the stock subscribed by them. The liability, therefore, exists, on the part of the original stockholders of the corporation to pay on call amounts remaining unpaid on their stock up to the par value thereof. This liability attaches only to the original holders of the corporate stock and their vendees with knowledge that a balance remains unpaid upon the stock. A *bona fide* purchaser on the open market, having no knowledge of the fact that a portion of the par value of the stock remains unpaid, is not subject to the liability. The corporation itself can, by contract with its members, relieve them from the payment of a part of the par value of the stock, though such an arrangement will not ordinarily

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be binding upon the creditors of the corporation. As to the latter, the obligation to pay par for stock remains.

A shareholder may become indebted to the corporation personally by a transaction between them, but this is not regarded as a membership liability in the ordinary sense.

When the obligation called for by the subscription to the shares of stock of a corporation is performed, it has no farther rights which it can enforce against the member. The contract of subscription determines and measures the liability of a shareholder to the corporation.

To Other Shareholders. One of the distinctive characteristics of a private corporation is, that between the members there does not exist a trust relation when the contrary rule obtains in other forms of association by natural persons. The liability to pay par for the stock runs from the individual member to the corporation itself, and not to the other members. If any one of them fail to perform this contract, a personal liability to the other members will not be created. The courts have, however, held, that the members of a corporation are engaged in a common enterprise. One of the rights of a stockholder, it will be remembered, was that of receiving dividends, and the existence of this right carries with it a corresponding liability to share in the financing of the corporation. Members failing to pay the full par value of their stock into the corporate treasury may be compelled by the other stockholders, because of the community of interest and of obligation noted above, to respond to their contract obligations.

The courts have also held that members of a corporation can have set aside secret arrangements by the corporation with other members by which they are to receive their stock on more favorable terms.

To Creditors. The liability of stockholders in a corporation to the corporate creditors is commonly divided into statutory or constitutional, and other than statutory or constitutional. The latter includes common-law liability, so-called, and what is known as a partnership liability.

Partnership Liability When Corporate Organization is

Defective. In a preceding chapter the importance was suggested of the ability to determine when a legal corporation existed, this, from the standpoint of a natural person, forming one of a group of persons associated in a corporate capacity. The liability of a stockholder in a corporation for the corporate debts being a limited or restricted one when compared with that of a natural person or a co-partnership. The corporate relation established, the extent of the liability is consequently established. When the required tests of a legal incorporation are applied and affirmatively answered, a legal corporation exists whose corporate rights in this respect cannot be questioned even by the State. In the creation of corporations, informalities and irregularities may occur which, while they deprive it of the character of a corporation *de jure*, do not take away its right to exist as a corporation and act in a corporate capacity, a corporation of the latter class being known as one *de facto*. The attempt on the part of a group of natural persons to organize a corporation may, however, not be made in good faith; or the irregularities and informalities may be so grave that even a *de facto* corporation is not created. The liabilities of the members of a defective corporation of this kind will be those of a co-partnership. In some cases, also, the courts have held, that the liabilities of those organizing a corporation for obligations incurred prior to incorporation will attach to them as co-partners, unless expressly adopted or assumed by the corporation upon its organization. It might be said that the law is steadily tending to the establishment of at least a *de facto* corporation, unless the informalities and irregularities are so grave in character as to prevent this holding, or unless some of the other essentials of a *de facto* corporation do not exist.

§ 100. Common-Law Liability. The entire obligation of the member of a corporation to it and its creditors is measured by his contract of subscription to the shares of stock of the corporation. This contract of subscription called for the payment in money or in money's worth to

the corporation by the stockholder of the par value of the stock. Upon failure to perform the obligation of this contract as to payment, the corporation could enforce its terms against the stockholder. The contract obligation to pay par for the stock by the original subscriber is known as the common-law liability. It exists, not as a matter of statutory or constitutional provision, but by reason of the terms of the contract made by the subscriber. In some States, constitutional and statutory provisions have been adopted or passed holding a stockholder liable for the debts of the corporation to the extent of the par value of the stock. These provisions are merely declaratory of the common law. The obligation to pay par for the stock exists independent of statutory or constitutional provisions. By arrangement between the corporation and the stockholder, the latter may be relieved of a part of this obligation. A release, however, of this character, will not affect the rights of the corporate creditors who can enforce in some proceeding the payment by the stockholder of the full par value of his stock.

§ 101. Liability for Capital Wrongfully Distributed. It has been a common holding of the courts that the capital stock of a corporation is a trust fund, to be maintained by it at parity for the benefit of the corporate creditors. The trust fund theory will be fully discussed later, but attention is called to it here for the reason that it may involve the liability of a stockholder to creditors in case they have permitted the property of the corporation, or an equivalent value of its capital stock, to be distributed among themselves to the injury of the corporate creditors. The courts hold without exception that where this has been done the corporate stockholders will be liable in proportion to their stock holdings to the extent of the property wrongfully and illegally distributed. This liability, it will be noted, is the application of the common-law liability, so-called, to circumstances or conditions not originally arising. The common-law obligation is that the stockholder shall pay to the corporation the par value of his stock for the benefit

of the corporate creditors. If, after having paid this, he permits the fund thus created to become illegally diminished, it will be regarded, on his part, as if he had not complied with his common-law obligation. "The stockholders have no right to anything but the residuum of the capital stock after the payment of all the debts of the corporation. If, before all such debts are discharged, they take into their hands any of the funds of the corporation, they hold them subject to an equity which is against conscience to resist."¹

§ 102. **Statutory or Constitutional Liability.** In nearly all of the States, by constitutional or statutory provision, there has been established a stockholders' liability in excess of or beyond that created and existing by reason of the contract of subscription; viz, the common-law liability. In some States these provisions exist providing for a liability to the full par value of the stock, but these have been commonly construed as simply declaratory of the common law. The phraseology of constitutional and statutory provisions relative to stockholders' liability varies, and the particular meaning of words used and the application of them must be learned by consulting the decisions of a particular State. They impose, usually, a liability in addition to the common law liability. They are not to be extended by implication, and the courts usually apply strict rules of construction in their application, since they are in derogation of common law. The Constitution of Minnesota, Article 10, Sec. 3, provides: That "each stockholder in any corporation, excepting those organized for the purpose of carrying on any kind of manufacturing or mechanical business, shall be liable to the amount of stock held or owned by him." This provision establishes what is commonly known as a double liability and is illustrative of a large number of similar enactments. There is, necessarily, a great diversity, as above stated, in the character of the liability created by statutory or constitutional pro-

¹ Kohl v. Lillienthal, 81 Cal. 378.

vision in excess of or beyond the common-law liability. A recent textbook states concisely their effect:²

“The liabilities thus imposed, may, however, be roughly classified as follows: (1) A joint and several liability as partners; (2) a joint and several liability as guarantors; (3) a limited and several liability to be enforced absolutely or, more commonly, upon regular proceedings against the corporation proving ineffectual. The first class abrogates entirely the rule of limited liability and is governed by the law of partnership. The member becomes a principal debtor. Under the second class the liability is secondary and collateral to that of the corporation, and is governed in a general way by the rules of guaranty. Thus, any act on the part of the creditors that will release a guarantor will release a stockholder from his liability. The liability under the third class is ordinarily limited to (a) an amount equal to the shares of capital stock held by the member; or (b) an amount equal to the ratio which the member's proportion of the capital stock bears to the entire corporation indebtedness. ‘The distinctive characteristic of this liability is that each member stands liable for a definite sum and no more, irrespective of the amount for which the others are liable. It is a several, unequal, and limited liability as to which each member stands alone, except that, if he pays more than his proportion of the debts of the company, he may, as in other cases, have contribution from his fellow shareholders.’ ”

Constitutional Provisions: When Self-Executing. Constitutional provisions imposing an additional liability are self-executing, as the phrase is used, when they require no additional action by the legislature to make them available to creditors. A constitutional provision not self-executing, must be supplemented by legislation to become operative. Its character in this respect will be ascertained from its language and the intent as gathered from the circumstances and the conditions attaching to its adoption; if the phraseology of the provision is general or the extent of the liability not fixed, legislation will be necessary. The decisions in the different States are at variance in the construction of constitutional provisions similarly worded. In discussing

² Abbott's Elliott on Private Corporations, 4th ed. § 558.

the question of whether a constitutional provision was self-executing, Justice Mitchell, in a case which is frequently cited, said:

“A constitution is but a higher form of statutory law, and it is entirely competent for the people, if they so desire, to incorporate into it self-executing enactments. These are much more common than formerly, the object being to put it beyond the power of the legislature to render them nugatory by refusing to enact legislation to carry them into effect. Prohibitory provisions in a constitution are usually self-executing to the extent that anything done in violation of them is void; but instances of affirmative self-executing provisions are numerous in almost every modern constitution.”³

Exemptions. While the State encourages the organization of all private corporations, it may especially favor those formed for manufacturing and other purposes, the transaction of the business of which tends more immediately and directly to the building up and to the advantage of a community. In some States this attitude has been exhibited by excepting from the operation of constitutional or statutory provisions imposing an additional liability the stockholders of these corporations. The constitutional provision of Minnesota is illustrative of the statement. An exception there is made of corporations organized for mechanical and manufacturing purposes. In respect to these, there exists but the common-law liability; as to all others, a double liability.

Power to Create Membership Liability. It is clearly within the power of the State, in a valid exercise of its power of regulation, to adopt or pass the constitutional or statutory provisions noted in a preceding section, establishing an additional liability on the part of the corporate members for the debts of the corporation. The only possible limitation may arise when the State, in the grant of a charter, has specifically limited membership liability. A grant of this character will be construed as a part of the contract between the State and the corporation and its members,

³ *Willis v. Mabon*, 48 Minn. 140.

the obligation of which cannot be impaired by any subsequent act of the State. If the power to alter, amend, or repeal has been reserved, this limitation is eliminated.

Nature of Liability. A statutory or constitutional liability may either be contractual or penal in its nature. This fact is important as affecting the rights of the creditors to pursue available remedies in the enforcement of their claims against the corporation. The language and purpose of the enactment determines, ordinarily, its nature as contractual or penal, and the decisions of the courts in the different States must be examined to determine the question when it arises. The Minnesota provision already quoted is contractual in its nature. And, on the other hand, a liability imposed upon stockholders, officers, or agents of a corporation for a failure to comply with the provisions of law in respect to the filing and publishing of certain designated reports has been held to be penal. The liability imposed upon stockholders in national banks is contractual in its nature, and it has also been held that this survives against the personal representatives of the stockholder. Whether a provision creating an additional stockholders' liability is contractual or penal affects also the right of the creditor to enforce the liability against stockholders residing in other States than that under the laws of which the corporation has been created, the common rule being that penal statutes have no extra-territorial force. A penal liability is incapable of enforcement against a stockholder in a foreign state.

Meaning of Word "Debts" and Similar Phrases. In statutory and constitutional provisions, the words "debt," "debts," "obligations," and other words or phrases of similar import are used in respect to which the additional liability can be enforced against stockholders. Naturally, the proper and legal significance of these words or phrases has been the occasion of judicial construction by the courts. The words are commonly applied to the debts of the corporation contracted or existing at a designated time, and are usually held to apply to obligations *ex-contractu*

and not to obligations which result from a tort of the corporation.

There are, however, several jurisdictions which hold to the contrary and construe the words as applying both to obligations contractual in their nature and also claims for damages sounding in tort. In some instances the liability applies only to debts due laborers and employees. The common construction here is that the additional liability is confined to claims based upon manual or menial service. The additional stockholders' liability cannot be enforced, for illustration, to satisfy a claim for unpaid salary by an assistant superintendent or attorney.

To Whom Liability Attaches. The usual rule prevails that the additional or stockholders' liability established by a constitutional or statutory provision attaches to the registered stockholder; that is, the one whose name appears upon the stock books and records of the company as sustaining to the corporation the relation of membership. This rule has been modified in some cases where a transfer has been made by a solvent member for the purpose of avoiding his stockholders' liability. A transfer for this purpose is termed a colorable transfer, and has been defined as one which is technically and legally correct, but made for the purpose of defrauding creditors. If a transfer is made to what is known as a straw man, or to a person *non sui juris*, or to the corporation, although the transfer be technically made, the creditors can hold, if they elect, the transferrer of the stock. A colorable transfer may also exist where stock has been transferred as a gift to others when the transaction results in a fraud upon creditors, although, if the gift is made in good faith by the former stockholder, the transfer will be sustained.

In some States, also, by statute, the creditor is given a designated time within which he can elect to hold either the transferor or the transferee, even where the transfer is made in good faith and for a valuable consideration, and not for the purpose of avoiding stockholders' liability or defrauding the creditors of the corporation. An illustra-

tion of an act of this character is to be found in the Rev. Laws of Minnesota, 1905, Sec. 2985, where it is provided that "every person becoming a stockholder (in a bank) shall succeed, in proportion to his interest, to all the rights and become subject to all the liabilities of his transferor, but the liability of the latter shall continue for one year after the entry of such transfer."

Statutory provisions also exist in many States which, in effect, provide that a transfer of stock shall not in any way exempt the person making such transfer from any liabilities of the corporation which were created prior to the transfer. In respect to colorable transfer, it might be said, however, that the law is steadily tending to the protection of the *bona fide* owner who purchases on the open market and for a valuable consideration.

Stock Held in Fiduciary Capacity. Where stock appears upon the books of the company in the name of a person as trustee, liability attaches to the estate, and where one holds stock as an executor or administrator the estate is held liable, in many States, by express statutory provision. Where stock is held by one in a trust capacity, or as agent for another, in the absence of facts or record entries stating the relation, the rule is that the creditor can elect to hold either the one whose name appears as the registered stockholder, the *cestui qui trust*, or the undisclosed principal. A stockholder may be also estopped to deny his relation where he exercises rights and accepts the benefits of membership in the corporation, although no formal transfer has been made upon the books of the company; and the courts have also held, in protection of a transferor, who has in good faith made a transfer of his stock, that where the transferee or the corporation have negligently failed to make proper and complete entries on the books of the corporation, that the transferee will be held to the stockholders' liability.

Enforcement of Liability. The extent and the nature of stockholders' liability established by constitutional or statutory provisions is created and attaches, undisputably,

as the result of them. They vary so widely in the different jurisdictions that it is impossible to state any general rule or principle which will be of material assistance to the reader upon the subject of this section. In some States the creditor is authorized to proceed directly against the stockholder for the enforcement of the liability. In others, the common remedy is of an equitable nature where all the stockholders and creditors are brought into court and the debts equitably adjusted. The liability is generally a secondary one, although in some States it is made a primary obligation on the part of the stockholder. Where it is secondary, the universal rule obtains that a liability can only be enforced against a stockholder after a judgment has been obtained against the corporation and an execution returned thereon *nulla bona* (no property). The creditor must first exhaust all means for the collection of his debt against the corporation before he can proceed to enforce the stockholders' liability. A judgment obtained by him against the corporation is usually held to be conclusive upon the question of corporate indebtedness in subsequent proceedings against the stockholders to enforce his liability. No general rule can be stated by which can be accurately determined the proper person to enforce the liability. This will depend, again, on statutory provisions. The decisions of a particular court and the statutes relating to stockholders' liability must be examined and followed. It is not common, however, to regard a stockholder's liability as an asset of the corporation in the common acceptance of that term. In some States, a receiver of the insolvent corporation is the proper party to enforce the statutory liability of stockholders.

In Foreign Jurisdictions. The decisions in respect to the right to enforce a stockholder's liability in foreign jurisdictions are unsatisfactory and conflicting. If the liability is contractual in its nature, many foreign jurisdictions permit its enforcement against non-resident stockholders. The right is construed and determined according to the *lex loci contractus* and the remedy must be followed and

construed according to the law of *lex loci* (law of the place) *forum*. The right in a foreign state to enforce a stockholder's liability has been construed liberally in some States and strictly in others; so narrow in some cases as to practically deprive creditors of a part of the security on which their debts were contracted. It is universally admitted that where the liability is penal in its nature, it cannot be enforced outside the State creating the liability. The decisions, in establishing the character of the law creating a stockholder's liability as contractual or penal, hold that it is the effect and not the form of law which determines this. A penal law has been defined as one which directs or prohibits some act and imposes some forfeiture for its transgression.

§ 103. **Shareholder's Liability.** When proceedings are brought to enforce a stockholder's liability, while the common rule obtains that the registered stockholder is the one ordinarily liable, yet the time when the debt was contracted may change the rule, and the decisions involving a determination of this point are numerous and conflicting, the result of contrary statutory provisions in many cases even in the same State. The statutes and decisions in each jurisdiction, at the time it is necessary to determine the question, must be examined to ascertain the correct rule of law to be applied at a specific time. In general, it might be said, that there are three lines of decisions, in main the result of the varying conditions noted above, one line holding that the stockholders who were such at the time the debt was contracted will be liable, and a transfer will only release them from debts subsequently incurred. A transfer will not release them from those incurred by the corporation during their membership. Another line of decisions is to the effect that a registered stockholder at the time when the proceedings were commenced to enforce liability, is alone liable. And still other decisions hold that all persons are liable as stockholders who sustained that relation to the corporation either at the time the debt was contracted, or who became such prior to commencement of the action.

§ 104. Stockholders' Defenses. The defenses or rights available to stockholders in cases of proceedings brought to enforce their statutory liability are usually the statute limitations, if applicable, a claim against the corporation, or set-off as it is termed, and the right of contribution from other members of the corporation. In the absence of statutory provisions granting the right, a stockholder is not permitted to set off against his statutory liability a claim in his favor against the corporation. The character of the liability as primary or secondary will govern the application of the statute of limitations. If primary, the obligation rests upon the stockholder at the time the debt is contracted and the statute of limitations commences to run at the time the debt is due. If secondary, the statute begins to run from the time the insolvency of the corporation is determined. If the liability is penal in its character, it will be governed by the statute of limitations in a particular State relating to penalties and forfeitures. Where a statutory liability is joint and several, if contractual, a stockholder who has been obliged to pay more than his proper proportion to liquidate the debts of the corporation is entitled to contribution from the other stockholders, but otherwise if the liability is penal.

CHAPTER XIII

CAPITAL STOCK

§ 105. **Definition and Nature.** The capital stock of a corporation is the amount fixed by the corporate charter as the sum paid in or to be paid in by the stockholders for the prosecution of the business of the corporation and for the benefit of corporate creditors. The capital stock of a corporation is to be clearly distinguished from its capital. Capital is wealth in use. It is that part of a man's stock which he expects to afford him a revenue, as defined by Adam Smith. The capital of a corporation consists of the sums paid in by the stockholders, increased by profits of the corporate business, and diminished by its losses. The capital stock of a corporation does not vary but remains fixed, although its capital may fluctuate widely in value, diminished by losses or increased by gains.

§ 106. **Shares of Stock: Stockholder.** The term stockholder indicates one who owns stock in a corporation and has been accepted as a member by it. He is one who owns one or more of the aliquot parts of the shares of stock into which the capital stock of the corporation is divided. He is an individual distinct and separate from the corporation in all its contracts and the transaction of its business. The corporation is the legal entity; its business is transacted in the name of the corporation and the title to its property is vested in the corporation. All rights resulting from the existence of a corporate capacity and the transaction of corporate business exclusively belong to it and are vested in the corporation as a legal person. A certificate of stock is the written acknowledgement by the corporation, under its seal, of the ownership by the person designated of one or more of the aliquot parts into which its capital stock is divided. Its possession is not necessary to constitute a

person a stockholder. It is the legal fact of ownership which establishes the relation.

Nature of Shares of Stock. Shares of stock are universally regarded as personal property, and this is true although all the property of the corporation may consist of real estate. A share of capital stock, though personal property, is not a chattel. It is, as some authorities declare, property in the nature of a chose in action. Its character is such that it ordinarily cannot, either by act of law or of its owner, be taken into tangible possession by its owner. It is representative merely. The certificate of stock, as evidence of that ownership, may, however, be taken into tangible possession. The certificate of stock is *prima facie* evidence of the ownership of the particular property designated. It transfers nothing from the corporation to the stockholder, but merely affords the latter evidence of his rights. A certificate of stock, further, it should be clearly understood, is not the stock, but merely evidence of the ownership of shares. Certificates of stock are not, in the true meaning of the words, negotiable instruments, though they are commonly regarded as quasi-negotiable.

The Statute of Frauds controls sales of capital stock since it is regarded as personal property, and its provisions must be complied with. On the death of the stockholder shares are distributed as personal property and divided according to statutory provisions relative to the distribution of property of that character. Statutory provisions declaring the nature of shares of stock as personal property are common in all the States.

§ 107. **Classification of Capital Stock.** In the absence of statutory prohibitions, a corporation upon its organization may divide its capital stock into as many classes as the organizers may elect, which are known by names usually indicating their peculiar rights and characteristics. The usual classification, if different kinds are provided for, is that into common and preferred. By common stock is meant that which entitles the owners to an equal *pro rata* division of the profits, if any there be, one stockholder, or

class of stockholders, having no advantage, priority or preference over other stockholders in the division. By preferred stock is understood that which entitles its owners to some special right or priority over the holders of the common stock. The priority, preference, or advantage may consist in the right to receive dividends from the corporate profits before the holders of the common stock are entitled to any. The dividend rate may be a maximum one fixed by the articles of incorporation, or the rate to be paid may be left to the discretion of the board of directors or managing officers. It may be either cumulative or non-cumulative. If of the former class, all arrears of dividends on the preferred stock must be paid from the profits of subsequent years before the holders of common stock are entitled to receive dividends. If non-cumulative, the dividends paid to holders of preferred and common stock are determined and paid from the profits of corporate business of each fiscal year. The priority, preference, or advantage again may consist in other rights granted to the holders of the preferred stock. They may be entitled, for illustration, to elect a majority or a prescribed number of the board of directors, irrespective of the proportion which it bears to the total capital stock. Or the advantage may consist in rights granted to the holders of preferred stock to receive, upon a dissolution of the company, from the sales of the corporate property, after the payment of corporate debts, a reimbursement of the sums paid by them for their stock before anything can be paid to the holders of the common stock. To summarize, the rights usually granted to holders of preferred stock consist of a priority or a preference in respect to dividends, voting, or a division of corporate property upon dissolution. The preferences in respect to dividends and division of property are those commonly given.

Status of Preferred Stockholder. It must be understood, however, that because the holders of preferred stock are entitled to priority in the payment of dividends that they are legally entitled to them if the corporation has

not earned profits which can be properly applied to their payment. Dividends, both on preferred and common, or other classes of stock, must be earned, otherwise the corporate creditors have the legal right to enjoin the payment of dividends where, by so doing, they can prove that a portion of the sum representing the capital stock of the corporation will be illegally distributed and their security, therefore, impaired or diminished. If the dividends upon the preferred stock are cumulative, a holder of that stock has the right to prevent payments to common stock before the arrears are made up. A preferred stockholder, where his priority consists of a preference in respect to the payment of dividends, is not considered a creditor of the property or the assets of the corporation upon its insolvency, and he is not entitled to any arrears of dividends upon his preferred stock in case of insolvency as a creditor of the corporation. On the question of the right to cumulative dividends, a New York court¹ said:

“The reasonable and fair interpretation of the contract (referring to the priority in dividends on preferred stock) is that the dividends were not only to be preferred, but being guaranteed, were cumulative and a specific charge upon the accruing profits, to be paid as arrears, before any other dividends were divided upon the common stock. The doctrine that preference shares are entitled to be first paid the amount of dividends guaranteed and of all arrears of dividends and interest before the other shareholders are entitled to receive anything, and although they can receive no profits where none are earned, yet, as soon as there are any profits to divide, they are entitled to the same, is fully supported by authority.”

§ 108. Declaration of Dividends within Discretion of Managing Officers. As already stated, no dividends can be paid to any class of stockholders except from the net earnings or profits of the corporation, and the declaration of dividends is left, in all cases, to the discretion of the board of directors or managing officers. They may apply

¹ Boardman v. Lake Shore, etc., Ry. Co., 84 N. Y. 157.

the net profits or earnings of corporate business toward the payment of debts, the enlargement of the corporate plant, the accumulation of a cash surplus or reserve, if, in the exercise of their best and honest business judgment and discretion such a course is advisable, rather than in its distribution in the form of dividends to the stockholders of the corporation.

§ 109. Trust Fund Theory. In an early case,² Justice Story declared that the capital stock of a corporation is a trust fund in the hands of the corporation for the payment of its debts, and that the corporation stands in the relation of a trustee to the creditors and the shareholders of the corporation. This doctrine was attempted to be applied in many subsequent decisions in its technical meaning, but it is quite evident that Justice Story did not so intend, but used the language in its general sense and under the limitations which have since been stated by the Supreme Court of the United States and in many other jurisdictions. The true basis upon which the property of a corporation is held, both for its creditors and for its stockholders, is well stated in a recent case in the Supreme Court of the United States,³ where the court, after referring to various decisions in which the phrase trust fund was used, and the trust fund doctrine applied, said:

“While it is true language has been frequently used to the effect that the assets of a corporation are a trust fund held by a corporation for the benefit of creditors, this has not been to convey the idea that there is a direct and express trust attached to the property. . . . A corporation is a distinct entity. Its affairs are necessarily managed by officers and agents, it is true; but, in law, it is as distinct a being as an individual is, and is entitled to hold property (if not contrary to its charter) as absolutely as an individual can hold it. Its estate is the same, its interest is the same, its possession is the same. Its stockholders may call the officers to account, and may prevent any malversation of funds, or fraudulent disposal of property on their

² *Wood v. Dummer*, 3 Mason, C. C. 308.

³ *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371.

part. But that is done in the exercise of their corporate rights, not adverse to the corporate interests, but coincident with them.

“When a corporation becomes insolvent, it is so far civilly dead, that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which, in other circumstances, are as much the absolute property of the corporation as any man’s property is his.”

In a Minnesota case,⁴ in an opinion by Justice Mitchell, the court said:

“This trust fund doctrine, commonly called the American doctrine, has given rise to much confusion of ideas as to its real meaning, and much conflict of decision in its applications. To such an extent has this been the case that many have questioned the accuracy of the phrase, as well as doubted the necessity or expediency of inventing any such doctrine. While a convenient phrase to express a certain general idea, it is not sufficiently precise or accurate to constitute a safe foundation upon which to build a system of legal rules. . . . The phrase that ‘the capital of a corporation constitutes a trust fund for the benefit of creditors’ is misleading. Corporate property is not held in trust, in any proper sense of the term. A trust implies two estates or interests, one equitable and one legal; one person, as trustee, holding the legal title, while another, as the *cestui que trust*, has the beneficial interest. Absolute control and power of disposition are inconsistent with the idea of a trust. The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits of it, and sell and dispose of it, the same as a natural person. It is a trustee for its creditors in the same sense and to the same extent as a natural person, but no further.”

“The trust fund doctrine only means that the property of the corporation must first be appropriated to the payment of the debts of the company before any portion can be distributed to the stockholders; it does not mean that the property is so affected by the indebtedness of the company, that it can not be sold, transferred, or mortgaged to *bona*

⁴ *Hospes v. Northwestern Mfg. & Car Co.*, 48 Minn. 174.

fide purchasers for a valuable consideration, except subject to the liability of being appropriated to pay that indebtedness. Such a doctrine has no existence.”⁵

§ 110. Watered or Bonus Stock. By watered or bonus stock is meant that which is issued as fully paid up, when in fact the whole amount of the par value thereof has not been paid in. It is, accordingly, stock which purports to represent but does not represent, in good faith, money paid into the treasury of the company or money’s worth, or services rendered and actually contributed to the working capital of the corporation. It will be remembered that the contract of subscription between the original stockholder and the corporation upon its organization was to pay into the corporate treasury, for its benefit and the benefit of the corporate creditors, money or money’s worth to the full par value of the stock. This contract obligation is used as the basis of the common law liability on the part of stockholders.

To prevent a fictitious increase in the stock or indebtedness of the corporation, many States have, by constitutional or statutory provisions, prohibited the issuing of capital stock or evidences of indebtedness except for money, property, or services or money’s worth received by the corporation. The constitutional provision of Illinois,⁶ is illustrative of this class of prohibitions, “No corporation shall issue stock or bonds except for money, labor done, or money or property actually received, and all fictitious increase of stock or indebtedness shall be void.” In the absence of statutory or constitutional provisions, as a rule the issue of stock of this character is not held unlawful. The legal argument against the issue of watered or bonus stock is based upon the proposition that the transaction is a fraud upon the creditors.

Liability of Stockholder on Watered or Bonus Stock. The capital stock of a corporation unimpaired is supposed to be represented by its full par value in corporate property

⁵ Abbott’s Elliott on Private Corporations, § 318.

⁶ Illinois Const., Art. 11, § 13.

and constitutes a fund for the payment of its corporate debts. The issue of capital stock as fully paid up, when this is not the fact, may, under certain conditions, mislead and perpetrate a fraud upon those dealing with the corporation. Even in the absence of a statutory or constitutional prohibition, the decisions establish the doctrine that it is not every creditor who can complain because of the issue of watered or bonus stock. The test of his right to complain is whether he was injured by the act of the corporation. It is well settled that an equity in favor of a creditor does not arise absolutely and in every case to have the holder of watered or bonus stock pay for it contrary to his actual contract with the corporation. No such equity exists in favor of one whose debt was contracted prior to the issue, since he could not have trusted the company upon the faith of such stock.⁷ Again, an equity in favor of a subsequent creditor cannot exist where he has dealt with the corporation with a full knowledge of the conditions and circumstances under which it was issued, and the fact of the issue of watered or bonus stock, for no one can be defrauded by that which he knows of when he acts. If the corporation having watered or bonus stock incurs a debt, a creditor with full knowledge clearly cannot complain.⁸

The doctrine that no equity exists in favor of a corporate creditor to have the holder of bonus or watered stock pay its full par value to the corporation has also been applied in cases where stock has been issued and sold at its full market value, though less than par, to pay the corporate debts; or where an active corporation, whose original capital has been impaired, for the purpose of recuperating itself, issues new stock and sells it on the market for the best price obtainable though less than par.

In each of the instances above noted, the trust fund theory has been applied by some courts, but the weight of

⁷ *Coit v. Gold Amalgamating Company*, 119 U. S. 343; *Handley v. Stutz*, 139 U. S. 417.

⁸ *First National Bank v. Gustin, Minerva, etc., Mining Co.*, 42 Minn. 327.

modern authority follows the application of that rule as stated in *Hollins v. Brierfield Coal & Iron Co.* cited above. In the Minnesota case above cited, *Hospes v. Mfg. Car Co.*, Justice Mitchell, in explaining the trust fund doctrine as applied to bonus or watered stock, said:

“It is difficult, if not impossible, to explain or reconcile these cases upon the trust fund doctrine, or, in the light of them, to predicate the liability of the stockholder upon that doctrine. But by putting it upon the ground of fraud, and applying the old and familiar rules of law on that subject to the peculiar nature of a corporation and the relation which its stockholders bear to it and to the public, we have at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have a right to assume that it has paid-in capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and, in case the corporation becomes insolvent, the law, upon the plainest principles of common justice, says to the delinquent stockholder, ‘Make that representation good by paying for your stock.’ It certainly cannot require the invention of any new doctrine in order to enforce so familiar a rule of equity. It is the misrepresentation of fact in stating the amount of capital to be greater than it really is, that is the true basis of the liability of the stockholder in such cases; and it follows that it is only those creditors who have relied, or who can fairly be presumed to have relied, upon the professed amount of capital, in whose favor the law will recognize and enforce an equity against the holders of bonus stock.”

The leading case on the right of a corporation, whose capital stock has been impaired, to issue stock and place it upon the market at less than its par value, is *Handley v. Stutz*, cited above, where the court said:

“The case then resolves itself into the question whether an active corporation, or, as it is called in some cases, a ‘going concern,’ finding its original capital impaired by loss

or misfortune, may not, for the purpose of recuperating itself and providing new conditions for the successful prosecution of its business, issue new stock, put it upon the market, and sell it for the best price that can be obtained. . . . To say that a corporation may not, under the circumstances above indicated, put its stock upon the market and sell it to the highest bidder, is practically to declare that a corporation can never increase its capital stock by a sale of shares, if the original stock has fallen below par. The wholesome doctrine, so many times enforced by this court, that the capital stock of an insolvent corporation is a trust fund for the payment of its debts, rests upon the idea that the creditors have a right to rely upon the fact that the subscribers to such stock have put into the treasury of the corporation, in some form, the amount represented by it; but it does not follow that every creditor has a right to trace each share of stock issued by such corporation, and inquire whether its holder, or the person of whom he purchased, has paid its par value for it. It frequently happens that corporations, as well as individuals, find it necessary to increase their capital in order to raise money to prosecute their business successfully, and one of the most frequent methods resorted to is that of issuing new shares of stock and putting them upon the market for the best price that can be obtained; and so long as the transaction is *bona fide*, and not a mere cover for 'watering' the stock, and the consideration obtained represents the actual value of such stock, the courts have shown no disposition to disturb it. Of course, no one would take stock so issued at a greater price than the original stock could be purchased for, and hence the ability to negotiate the stock and to raise the money must depend upon the fact whether the purchaser shall or shall not be called upon to respond for its par value. While, as before observed, the precise question has never been raised in this court, there are numerous decisions to the effect that the general rule that holders of stock, in favor of creditors, must respond for its par value, is subject to exceptions where the transaction is not a mere cover for an illegal increase."

Parties Interested in Issue of Bonus or Watered Stock.
The parties interested in an issue of watered or bonus stock are the corporation, the stockholders, and the creditors. The authorities are agreed that the corporation and all

assenting stockholders are bound by the issue of such stock. The rights of creditors have been sufficiently discussed in the preceding sections.

§ 111. Fraudulently Issued Stock. A corporation may issue stock, in excess of the limit fixed by law, intentionally or accidentally. This is invalid, even in the hands of a *bona fide* purchaser for value, and the corporation can have it declared void and cancelled. The possession of certificates of stock representing an over-issue clearly can confer no rights of membership. The amount of capital stock is fixed by the charter of the corporation. A *bona fide* holder of over-issued stock may, however, recover damages from the corporation if its certificates were signed by the corporate officers and when acting within the apparent scope of their power and authority. The corporation is estopped to deny the act of its officers or agents under such circumstances.

§ 112. Methods of Issuing Capital Stock. Capital stock may be issued by the corporation in return for money or money's worth, and as between itself and the original stockholder, in the absence of statutory limitations, for an agreed percentage up to and including its par value. Its creditors, however, are not bound by such arrangements, when less than par is paid for the stock. Where the corporation receives cash for the stock issued, no controversy can arise in respect to the sufficiency of the payment. The courts are uniformly agreed, however, that not only may capital stock be issued for money, but also for money's worth, which may consist of property transferred, to the corporation in exchange for the stock, or services, or construction work for and on behalf of the corporation. The claim may be made under such circumstances that the stock thus issued is watered or bonus stock. The value of the services, the property exchanged, or the construction work, in these cases will determine the validity of the transaction. If of a fair and reasonable value at the time of the transaction, and if the parties acted in good faith, the courts have held that the corporation has received its money's worth for

the stock issued. The transaction will, therefore, be valid and the stock not regarded as watered or bonus stock. The question involved, it will be observed, is whether there was a fraudulent overvaluation, and the answer depends upon the facts in each case. If the stock was exchanged for property or construction work, its value at the time the exchange was made determines the rights of the parties, although there may have been a subsequent material and substantial depreciation in the value of the property, or although the construction work may have been done at a much cheaper price later.

Another method by which the corporation may issue stock is through the declaration of a stock dividend. Where this is done, the authority for an increase of capital stock must first exist. If the corporation can legally increase its capital stock, a stock dividend will not be unlawful if the corporation has property equivalent at a reasonable and fair valuation to the par value of the stock then issued and further equal to the increase of its capital stock at the time of the declaration of the stock dividend. It is immaterial to the creditors of the corporation, or the State, whether its entire capital or only a proportion of it is represented by capital stock. The State can only complain where the corporation has violated some express statutory provision. The creditors are only afforded relief when they have been defrauded through the issue of the stock dividend. Stockholders participating clearly cannot complain, and the corporation is estopped to deny the validity of its action.

§ 113. Transfer of Capital Stock. *Right Of.* Shares of stock are personal property and, in common with property of like character, can be transferred freely and at the will of the owner in the absence of express statutory provisions. The right to transfer, it has been held, is of vital importance, since one of the principal reasons for the organization of a corporation and the phenomenal growth of artificial persons in recent years is the readiness afforded to owners of stock to withdraw from the corporation by a transfer of their interest. It has been and is now the policy

of the courts to afford the greatest possible freedom to the owner of personal property to acquire and dispose of the same. The right of transfer is not derived through the charter of the corporation, but is incident to ownership.

Regulation Of. The right of transfer, as already stated, is absolute except when restricted by charter or statutory provisions. The corporation itself has no power to prohibit the transfer of shares, nor is it within the power of the corporation or of the corporate officers or directors to adopt regulations which unreasonably limit the right of the stockholder to transfer his interest in the corporation at will. It has been held, however, in some cases, that where express charter provisions provide limitations upon the power of alienation, these control, since they constitute a part of the contract between the members of the corporation and the corporation. By-laws, or agreements, which place restrictions upon a transfer of shares, will be ordinarily held void as in restraint of trade. This principle does not apply to the power of the corporation to prescribe reasonable rules and formalities to be observed by the stockholder in the transferring of shares, not only for the protection of the corporation, but in a certain and indirect sense for the protection of the stockholder. By-laws, therefore, requiring the surrender of the old certificate of shares of stock to the proper officer of the corporation, for its cancellation before a new one will be issued, have been held valid and not an unreasonable restraint of trade, the certificate of stock being *prima facie* evidence of ownership and the corporation only enabled to determine its membership from an inspection of its corporate records.

Parties Interested in Transfer. The parties directly and immediately interested in a transfer of shares of stock in a corporation are, the corporation, its creditors, the transferor and transferee, and, in some instances, their creditors. The ordinary rule prevails, in the absence of special conditions, that the stock records of a corporation determine, *prima facie*, the relation of the membership in the corporation. To the stockholders belong the right of

voting, of receiving dividends, or inspecting the corporate records, as well as others. They must be notified by the corporate officers of the various meetings of the corporation, dividend checks must be mailed to them, notices of calls or assessments served, and other acts done by the corporation in furtherance of their rights or liabilities as stockholders. It is essential, therefore, that the corporation be accurately informed of its membership. In case of the insolvency of a corporation, its creditors may be entitled, as a matter of law, to enforce their rights, not only against the property of the corporation, but also the stockholders' liability, if any. It is essential, from the creditors' standpoint, that they have accurate information in respect to the corporate membership. As between the immediate parties to the transfer, it is clearly necessary that some record exist which will determine their respective rights and liabilities. It further may be, in some instances, necessary for the individual creditors of the stockholders to attach or reach by due process of law the property of their debtors. Again, the stock records of the corporation must determine who is the stockholder.

Steps in a Legal Transfer. Shares of stock in a corporation, it will be remembered, represent merely the invisible, indivisible interest of the stockholder in the property of the corporation. The written acknowledgment of this interest is the certificate of shares of stock, and the transfer of the stockholders' interest is effected by the transfer of this written representative of his interest. In order to effect a complete formal and legal transfer, which will affect all parties interested in the transaction, certain steps are necessary before the result sought will be accomplished.

The first step necessary is a transfer by *simple delivery*, of the certificate of stock, by the transferor to the transferee, accompanied by a formal instrument of assignment of the stockholder's interest therein, with a power of attorney added. It is usual to have printed upon the back of the certificates of stock this formal instrument, including the power of attorney. When this step is taken, as between

the transferor and the transferee, the transaction is complete. A sale and delivery of personal property, that is, the interest in the corporation, represented by shares of stock, has been effected. The ownership of the property represented by the certificate of shares of stock has passed from the transferor or vendor to the transferee or vendee.

There are other parties, however, interested in the sale and transfer of shares of stock, notably, the corporation and its creditors. Creditors may be entitled to enforce rights against the stockholders and it is necessary for the corporation to determine, at any time, by an inspection of its books, the number of stockholders, their identity, and the amount of interest each has in the assets of the corporation, for the reasons enumerated in the preceding section. To afford the corporation the information and to enable the creditors to ascertain the names of the stockholders, the second and third steps requisite to a legal transfer must be taken, viz, the surrender of the certificate of shares of stock by the transferee to the proper officers of the corporation, its cancellation by them, the issue of a new certificate of shares of stock to the transferee, and, finally, the registration or entry upon the books of the corporation of the transfer of the stockholder's interest from the name of the transferor to the transferee. The courts are uniform in their holding that so far as the corporation itself is concerned, it is only bound to recognize the registered stockholder. Since this is true, it is equally important to the transferee, in order that he may be accorded his rights as a stockholder, that his name must appear upon the records of the corporation as sustaining to it that relation.

“This kind of property, being an intangible right, somewhat akin to the right to receive money due upon a bond or other chose in action, is incapable of actual manual delivery. All that the seller can do that corresponds at all to the delivery of personal chattels in other cases of sale is, to hand over to the buyer his certificate, with a sufficient assignment by deed or otherwise to entitle him to a transfer of the shares on the books of the company. When the

seller has done this, his power and duty in the matter are ended, and it is at the option of the purchaser whether the transfer shall be recorded or not. If the purchaser omits to have the record made, he can claim no rights as a member of the corporation; and he also incurs the further risk of having his title defeated by a subsequent attachment or sale to a *bona fide* purchaser."⁹

As between the transferor and the transferee, the delivery of the certificate of stock with the assignment is sufficient to convey the legal as well as the equitable title. This assignment may be in blank and the certificate pass from hand to hand, affecting a transfer of the interest in each case. The purchaser, however, cannot claim any rights of membership in the corporation until the final steps have been taken, viz, the surrender and cancellation of the old certificate, with the issue of the new and the registration of his name upon the books of the company.

Forged and Unauthorized Transfers. The universal rule obtains that an owner of personal property cannot be deprived of his interest therein by forgery, theft or otherwise. The rule is also well settled that a *bona fide* purchaser of a negotiable instrument, payable to bearer, although he buys from a thief, acquires a good title if he pays value for it and has no notice of the infirmity of his vendor's title. The statement of these two rules will enable the reader to determine the consequences of a forged and unauthorized transfer of shares of stock. A certificate of corporate shares of stock, it is well settled, in the ordinary form, is not negotiable paper, and the purchaser of such stock, although endorsed in blank by the owner, where no question arises under the by-laws respecting registration, obtains no better title to the stock than his vendor had in the absence of negligence on the part of the owner or his authority to make the sale. On the question of negotiability of a certificate of shares of stock, Judge Comstock, in a New York case,¹⁰ said:

⁹ *Scripture v. Soapstone Co.*, 50 N. H. 571.

¹⁰ *Mechanics Bank v. R. B. Co.*, 13 N. Y. 599.

“Such certificates contain no words of negotiability. They declare simply that the person named is entitled to certain shares of stock. They do not, like negotiable instruments, run to the bearer or order of the party to whom they are given.”

They are, in some respects, like a bill of lading or warehouse receipt, being merely representative of the property existing under certain conditions and the documentary evidence of title thereto. In an Alabama case¹¹ it was said:

“The most that can be said is that all such instruments possess a sort of quasi-negotiability, depending upon the custom of merchants and the convenience of trade. They are not, in the matter of transferability protected strictly as negotiable paper.”

It will be seen, therefore, that the first rule stated in this section applies and determines the rights of parties where there has been a forged or an unauthorized transfer of shares of stock. The owner cannot be deprived of his property, though his certificate passes into the hands of an innocent purchaser. He may, if he so elects, collect the value of the stock from the corporation, with his damages; but he cannot, on the other hand, if he does not so elect, be deprived of his ownership of an interest in the corporation. These principles apply universally, in the absence of negligence on the part of the owner. This may alter the rights of the parties, as stated above. These rules apply where certificates have been stolen or lost with the owner's name signed to an assignment in blank upon the back thereof, as in the case of a forged signature.

There are many cases where the holder of a certificate of stock endorsed in blank is clothed with power as agent or trustee to deal with such stock to an unlimited extent. It may be transferred in breach of trust or in excess of powers under which the stock is held. It has been held frequently, in this class of cases, that the true owner, having conferred on the actual holder by contract all the external appearances of title and apparently unlimited power of dis-

¹¹ East Birmingham Land Co. v. Dennis, 85 Ala. 565.

posal, is estopped to assert his title against a third person who, acting in good faith, acquires it for value from the apparent owner. These cases rest upon the principle that it is more just and reasonable, where one of two innocent parties must suffer loss, that he should be the loser who has put trust and confidence in the deceiver than a stranger who has not been negligent in trusting any one. On the other hand, shares of stock may be held in the name of one as trustee, agent, executor, or guardian and there is a sale or transfer for an unauthorized purpose or in excess of the powers conferred. In these cases, the courts have repeatedly held that the true owner cannot be deprived of his property, and may recover damages from the corporation for its loss. The principle controlling here is that where the external appearances exist of a limited or restricted power of transfer on the part of the holder, the corporation is bound to inquire and to satisfy itself of the authority of the trustee or agent to sell and dispose of it.

Effect of Transfer. A transfer of shares in a corporation, when complete, effects a substitution of a new stockholder in place of the outgoing one in the company, and the transferee assumes and acquires all the rights and obligations which attach to the purchaser by reason of his ownership of shares. The transaction involves a novation of the contract of membership. The transferor ceases to be a shareholder in the corporation. He is discharged, ordinarily, from further liability and loses all his right to share in the company's profits or to participate in the management of the corporation. The transferee, on the other hand, becomes the stockholder in place of the retiring member and assumes, impliedly, all of the obligations which rested upon his vendor, and is liable to the extent of the interest in the company which he has acquired.

Lien of Corporation. The absolute right to transfer shares of stock may be limited by statutory provisions granting to the corporation a lien on the capital stock of a member for debts due it by him. In the absence of provisions of this character, a corporation has no lien upon

the stock of a member and cannot prevent a transfer merely because of an obligation due and owing to it from him.

Wrongful Refusal to Transfer. Ordinarily, a corporation has no right to refuse registration to one who presents a certificate of stock for cancellation and the entry of his name upon the books and records of the company. It has been held in some cases, though, that it has the right to refuse to transfer stock to a person *non sui juris*, but it has no right to refuse to transfer stock held by an administrator or other person occupying a trust or a fiduciary relation when the proper authority is shown for the transfer. The same rule is true when applied to dealings by a trustee and sales by a guardian. The corporation may require proof of identity and the genuineness of signatures to the written assignment. The courts go far in holding that it is bound to detect a forgery of the name of a stockholder. It may refuse to transfer stock where it has, by lien or charter provision, a lien upon it for the debts of a member to it, although, in some cases, the transfer may be effected and the stock still subject to the lien. In case of a wrongful refusal, the person presenting the certificate may bring a suit in equity to establish his rights, or may, by *mandamus*, compel the corporate officers to formally complete the registration of the stock presented for transfer; or he may bring an action at law for the conversion of the stock and recover the damages which he can prove he has sustained.

The corporation may lawfully, however, refuse to issue a new certificate, except upon surrender of the old, as required by the by-laws of the corporation. Where it is claimed that a certificate has been lost or destroyed, it is customary for the corporation to require the giving of a bond protecting it against loss in case the old certificate should be presented for transfer. In some States, by statutory provision, it is obligatory upon the corporation, in case of lost or destroyed certificates, to issue a new one after the lapse of a certain prescribed time and without the giving of a bond of indemnity by the one receiving the new certificate.

CHAPTER XIV

SUBSCRIPTIONS TO CAPITAL STOCK

§ 114. **Legal Nature of Transaction.** A subscription to the stock of a corporation, when accepted, is a contract, and governed by the same principles of law as other contracts. The subscription may be made either for shares of stock in an existing corporation or in one to be organized. The general rule obtains that in the latter case the subscription merely is a continuing offer which may be accepted by the proposed corporation when its organization is complete, but which, until such acceptance, may lapse or be revoked.

“A subscription by a number of persons to the stock of a corporation to be thereafter formed by them has in law a double character. First, it is a contract between the subscribers themselves to become stockholders, without further act on their part, immediately upon the formation of the corporation. As such contract it is binding and irrevocable from the date of the subscription, at least in the absence of fraud or mistake, unless cancelled by consent of all the subscribers before acceptance by the corporation. Second, it is also in the nature of a continuing offer to the proposed corporation which, upon acceptance by it after its formation, becomes, as to each subscriber, a contract between him and the corporation.”¹

In the case of the subscription to the stock of a corporation already formed, the contract, of course, results upon the acceptance of the offer, and the first point to be examined is always as to which party made the offer. If the corporation merely opens books for subscriptions, it is held that the subscriber for shares is the one making the offer, and that the contract does not result until there has been an acceptance on the part of the corporation. But if the

¹ Minneapolis, etc., Co. v. Davis, 40 Minn. 110.

corporation makes a general solicitation of subscriptions, a subscription in accordance with such offer is an acceptance and will result in a contract *ipso facto*, and the subscriber becomes a stockholder by that act and he is bound to pay his subscription. Subscription after the corporation is formed should be distinguished from a sale of shares by it. In the first instance the contract becomes complete upon acceptance, and it is not necessary for the corporation to tender a certificate of stock before taking steps to enforce the subscriber's liability; while in the case of a sale of stock the ordinary rules of sales apply and the certificate must be delivered or tendered.

§ 115. Who May Subscribe. The general rule obtains that anyone who is in law capable of contracting may make a valid subscription to the stock of the corporation, and the ordinary rules regarding infants, lunatics and married women apply in this case as in other contracts. Whether one corporation may subscribe for shares of stock of another corporation already existing or to be formed will depend upon its charter powers to acquire and hold stock in other corporations. The general rule, it will be remembered, is that in the absence of express authority to this effect it cannot be done. A corporation cannot subscribe for its own stock. In general, a subscription made by a duly authorized agent will be valid. The question of the authority of the agent is here the material one, although an unauthorized act of an agent in subscribing for the shares of stock of a corporation may be subsequently ratified by the principal in one or more of the usual ways.

§ 116. Contract for Subscriptions. Form Of. At common law, no particular form of contract was required, and any act from which an intention to become a subscriber could reasonably be inferred was sufficient. There is some conflict upon the question of whether a subscription must be in writing, but the better opinion and the great weight of authority is to the effect that an oral subscription to the shares of stock is as binding as one in writing, unless the latter method is required by statute or charter provision.

In making the subscription the weight of authority is also to the effect that mere irregularities and informalities are to be disregarded, and that any agreement showing an intent on the part of the subscriber to become a stockholder in the corporation will be binding. The courts also hold that where one accepts the duties of a stockholder, or claims any of the rights appertaining to that relation, this act will be regarded as tantamount to a subscription to its shares of stock. Illustrations of the application of the principles stated will be found in cases holding that the acceptance and retention of a certificate of stock constitutes one a stockholder. A subscription made in a pocket memorandum book or on a single sheet of paper have been held to effect the same results. On the other hand, the signature of an individual to an incomplete copy of articles of incorporation, to a copy with the names of the directors left blank; where there has been a subsequent alteration of the subscription papers; where the business of the corporation is illegal; or where there is a misunderstanding as to the nature of the paper signed, have been held conditions sufficient to release a subscriber.

Consideration Of. A subscription for shares of stock in a corporation implies a promise to pay for them which sustains an action to collect without proof of any particular consideration. Since a consideration is an essential and material part of a valid contract, the courts have held that in the particular form of contract under consideration, a subscription to the shares of capital stock of the corporation, the consideration moving to the subscriber may consist of the advantages to be derived from membership, the stock to be received, the probable dividends or the assumption of actual obligations. Many courts have also held that a consideration is to be conclusively implied by law from the fact of subscription, and this rule applies to subscriptions taken before as well as after incorporation.

§ 117. Conditional Subscriptions. Subscriptions are sometimes made with some condition attached. These cases will fall into two general classes: subscriptions upon a con-

dition precedent and subscriptions upon a condition subsequent, or, as the phrase is used by many authorities, subscriptions upon special terms.

Conditions Precedent. A subscription to the stock of an existing corporation which is to take effect and become binding only in the event of the performance or the fulfillment of some act, or the happening of some contingency, lawful in itself, provided the corporation sees fit to accept it, is a valid present contract upon condition precedent. Until this condition is complied with, the subscriber does not become a member of the corporation and he is not entitled to any of the rights nor subject to any of the liabilities of a stockholder. If the time is named within which the condition must be performed, the subscription will lapse unless there is a performance within that time. Where the conditional subscription is not valid at the time it is made, because the corporation has no authority at that time to accept a subscription of this character, it may be treated as a continuing offer to subscribe upon the particular conditions, and it will become binding if not withdrawn before the conditions have been complied with. A subscription upon condition precedent to the stock of a corporation to be formed stands upon a different footing and is of doubtful validity. There is no corporation in existence to accept such a subscription and bind the subscriber, and it may operate as a fraud upon other subscribers to the capital stock. As was said by the Supreme Court of the United States:²

“The law prescribes that a certain amount of stock shall be subscribed before corporate powers shall be exercised; if subscriptions, obtained before the organization was effected, may be subsequently rendered unavailable by conditions attached to them, the substantial requirements of the law are defeated. The purpose of such a requirement is that the State may be assured of the successful prosecution of the work, and that creditors of the company may have, to the extent at least of the required subscription, the means of obtaining satisfaction of their claims. . . .

² 16 Wallace, 390.

If the subscriptions to the stock can be clogged with such conditions as to render it impossible to collect the fund which the State requires to be provided before it would assent to the grant of corporate powers, a charter might be obtained without any available capital. Conditions attached to subscriptions, which, if valid, lessen the capital of the company, thus depriving the State of the security it exacted that the railroad would be built, and diminishing the means intended for the protection of creditors, are, therefore, a fraud upon the grantor of the franchise and upon those who may become creditors of the corporation. They are also a fraud upon unconditional stockholders, who subscribed for the stock in the faith that capital would be obtained to complete the projected work, and who may be compelled to pay their subscriptions, though the enterprise has failed, and their whole investment has been lost. It is for these reasons that such conditions are denied any effect."

The general rule of law is also to the effect that conditions attached to subscriptions must be included in the written agreement. Secret and oral conditions are void and cannot be shown.

Conditions Subsequent. Conditions subsequent or upon special terms are those which contain some stipulation on the part of the corporation which operates, or is supposed to operate, in favor of the subscriber. There is a clear distinction between subscriptions of this class and those noted in the preceding subdivision. In the case of a subscription upon condition precedent, the subscriber does not become a member of the corporation until the condition has been performed. In the case of a subscription upon special terms, the stockholder becomes a member forthwith, subject to all the incidents of membership and the non-performance of the special terms or conditions does not affect his status as a member, though it may render the corporation liable in an action for damages. Whether a condition be "precedent or subsequent" is a question purely of intention, and the intention must be determined by considering not only the words of the particular clause, but also the language of the whole contract, as well as the nature

of the act required, and the subject-matter to which it relates.³ The courts favor conditions subsequent but not conditions precedent, and it is generally held that subscriptions to the capital stock of a corporation may be conditioned as to the time, manner or means of payment, or in any other way not prohibited by law or the rules of public policy, and not beyond the corporate powers of the corporation to comply with. The condition subsequent also must not operate as a fraud upon other subscribers. In a Tennessee case it was said:

“A subscription upon a condition subsequent contains a contract between the corporation and the subscriber whereby the corporation agrees to do some act, thereby combining two contracts, one, the contract of subscription, the other, an ordinary contract of a corporation to perform certain specified acts. The subscription is valid and enforceable whether the conditions are performed or not. The condition subsequent is the same as a separate collateral contract between the corporation and the subscriber, for the breach of which an action for damages is the remedy.”⁴

§ 118. Construction of Subscription to Shares. A subscription to the shares of capital stock is a contract, and the general rules of law applying to the construction of contracts will apply equally to this particular contract. The construction must be reasonable and according to the intent of the parties, and in determining this the circumstances of the subscription are to be considered. It might be said, however, that the courts have adopted one especial rule which is, that that construction of the contract will be followed which facilitates the organization and carrying on of the enterprise, rather than that interpretation of it which would defeat or impair its success. Ambiguities are, in common with other contracts, questions of fact to be determined by a jury.

§ 119. Enforcement of the Contract. A subscription to

³ Buckport, etc., Ry. Co. v. Brewer, 67 Maine 295.

⁴ Maury v. Steel Co., 87 Tenn. 262.

the stock of a corporation implies an agreement, as already stated, to pay therefor, and this obligation may be enforced by the corporation whether it be a subscription obtained before or after incorporation. The manner in which this obligation may be enforced varies. Generally, by charter, the power is conferred upon the corporation to forfeit the shares of the delinquent stockholder, but this power cannot be enforced unless expressly authorized. The right of enforcement must be exercised in a reasonable manner, and statutory provisions, if any, must be complied with. The usual method of enforcing liability is by action on the implied promise, although some States reject the idea of an implied contract, and hold that an action can be maintained by the corporation only in case of an express promise. Unless the statutory method by way of a forfeiture is made exclusive, it is the general rule that the two methods are cumulative, and the corporation may elect which one to pursue.

§ 120. Calls and Assessments. A call has been defined as an official declaration by the proper corporate authorities that the whole or a specified part of the subscription for stock is to be paid. No call or assessment is necessary when, by the charter, or by the terms of the subscription, it is made payable immediately or on or before a date certain. In the absence of provisions of the character noted, and especially when such a proceeding is provided for in the subscription itself, or in the charter or by-laws of the corporation, a call or assessment is necessary to perfect a right of action against the stockholder on his subscription. A call or assessment must be made in the proper manner and by the proper officers, but one is not necessary in cases of corporate insolvency. The stockholders cannot question the advisability of the call, this being a matter which is left exclusively to the official judgment and discretion of the managing officers of the corporation.

Calls or assessments must be uniform and require a proportionate contribution from each subscriber, but where

some of the stockholders have already contributed more than their share, the calls should be directed to those who are in arrears. The call to be effective and to serve, in cases of delinquency on the part of a subscriber, as a basis of action by the corporation against the subscriber, must be certain in respect to the time, the place, the manner in which, and the person to whom is to be paid the sum required by the call to be paid.

§ 121. **Defenses.** In case an action is brought to enforce the payment of a subscription to the shares of stock of a corporation, the subscriber, as defendant, may interpose as defenses certain facts or equitable rights which, if successfully maintained, will relieve him from his liability. The principal defenses urged by a subscriber are those of parol agreement and of fraud, which will be considered in the following paragraphs. In addition to these the subscriber may interpose as a defense the claim that the enterprise has been abandoned; that material and radical changes in the charter have been made without his express or implied consent; that conditions precedent have been unperformed; and that the corporation, without his consent, has consolidated with others.

Parol Agreement. Where the contract is in writing the defense of parol agreement will not be available to a subscriber to the shares of stock of the corporation. The usual rule applies that oral agreements or conversations are not admissible to vary, alter, or change the terms of a written contract: that neither party will be permitted to prove a different contract from the written one.

Of Fraud. "It is a general rule of law, that, if a person is induced to enter into a contract by false representations, fraudulently made by the other contracting party or his agent, the contract is voidable at the option of the innocent party. This rule applies with full force both to contracts of membership and to contracts to purchase, or to take shares in a corporation at a future time. It may be stated as a general rule, that if a subscription for shares was obtained by fraudulent representations, it may be

annulled by the subscriber at any time before equities have intervened.'"⁵

If the fraudulent representations are made by the promoters prior to the organization of the corporation, the difficulty arises that the promoter is acting for a principal not yet in existence. He clearly has no authority to bind the corporation subsequently formed, and the rule seems to be that whether the subscription is made in good faith or through fraud the subscriber will be bound. His remedy, if any, is against the promoter personally perpetrating the fraud upon him. Where, however, the corporation is organized, if the agent is acting within the apparent scope of his power and authority, his fraudulent acts and misrepresentations will be binding upon the principal, and the subscriber, if he can prove his case, will be relieved of the liability upon his subscription. A fraudulent representation in connection with this subject may be stated as a statement as to past acts or existing facts, or the omission of such statement, which amounts to a fraud on one who, relying thereon, subscribes to the stock of a corporation to his injury. The fraudulent misrepresentation may be made through, or by means of, the prospectus of the company, its official reports made after organization, oral statements made by its authorized agents and also by a suppression of the truth. The misrepresentation may consist in the omission to state a material and existing fact, equally with positive statements of that which is untrue. The general principles of the law of fraud and fraudulent representations apply to subscriptions made to the capital stock of corporations, and the question frequently arises as to whether the representations can be regarded as fraudulent unless they were known to be false by the person or persons making them.

The common rule applies to subscriptions to shares of stock of a corporation, that if a false representation which is material is made by one with no knowledge of its truth or falsity, he is guilty of fraud in a legal sense. A fraudu-

⁵ 1 Morawitz on Corporations, § 94.

lent representation consists in the statement of material facts not true, and their legal character is not changed by the condition that the person making them was not aware of their truth or falsity, or made the statement without the intention to deceive. False representations as to the law controlling the rights or powers of the corporation, or affecting the liabilities of the subscriber to its shares, do not afford a basis for relief by the subscriber.

That certain property has been bought by the corporation, when it held merely an option upon it; that a certain amount of stock had been subscribed, when as a matter of fact the total subscriptions were materially less; that the property of the corporation was free from debt, when in truth there were outstanding obligations; and that the corporation was solvent, prosperous, and engaged in the conduct of a highly remunerative business, when the contrary was true, have each been held false representations of such a character as to relieve the subscriber entirely from his liability.

A distinction must be made, however, between statements specifically alleging what does or does not exist, and expressions of opinion as to the prospects or operations of the corporation. The latter class of expressions are regarded as mere matters of opinion and belief, and though exaggerated and illusory will not afford a subscriber relief on the ground of fraud.

“There is no right of action where such representations consist of the expression of mere matters of opinion or belief as to a present fact, or consist of predictions, or expressions of expectation or hope, as to the future operations or success of an enterprise in which the corporation is engaged or proposes to engage. . . . It has been said that any one who looks at the prospectus of a corporation understands that the thing is colored, in the sense that everything is put forward in the most favorable view.”⁶

A representation that the corporation would pay as much as twenty per cent in dividends was held to be a mere

⁶ Thompson on Corporations, 2nd ed., §§ 721-723.

expression of opinion, and where an officer of the corporation said to the subscriber: "There is a good thing; you ought to go into it; there is some money in it; you may make twenty per cent on your money; you never put your money into any better investment than that," the statement was held insufficient to sustain the charge of fraud.

CHAPTER XV

MANAGEMENT OF CORPORATIONS OFFICERS AND AGENTS

§ 122. Rights of Members. The individual rights of stockholders in a corporation have been sufficiently considered under the chapter relating to the rights of members. Briefly stated, the rule is that they have no power or right after the election of the board of directors or managing officers to participate in the active and immediate management of the business affairs of the corporation. A further suggestion is appropriate in respect to the powers of the majority. The general doctrine obtains that the majority in interest controls the corporation, but this power is not without its limitations, for the courts have held that while no trust relation, in a technical sense, exists as between the stockholders of the corporation, yet the majority cannot so exercise their power as to deprive the minority of their essential rights. The rule is well stated¹ by J. C. Harper:

“The holders of a majority of the stock of a corporation may legally control the company’s business, prescribe its general policy, make themselves its agents, and take reasonable compensation for their services. But, in thus assuming the control, they also take upon themselves the correlative duty of diligence and good faith. They cannot lawfully manipulate the company’s business in their own interests to the injury of other stockholders. They cannot by their votes in a stockholders’ meeting lawfully authorize its officers to lease its property to themselves, or to another corporation formed for the purpose and exclusively owned by them, unless such lease is made in good faith and is supported by an adequate consideration; and, in a suit properly prosecuted to set aside such a contract, the burden of proof showing fairness and adequacy, is upon the party or parties claiming thereunder.”

¹ Cook v. Sherman, 20 Fed. Rep. 175.

The broad principles stated in the first sentences of this note have been frequently applied in recent decisions to many acts of the majority resulting in a consequent injury to the minority interests.

§ 123. Directors: General Authority. It is customary for the stockholders of a corporation, in a stockholders' meeting, to elect a board of directors or managing officers to whom is entrusted the immediate power and right of managing and transacting the business of the corporation for and in its name and behalf. A general presumption of authority exists in respect to the validity of their acts. Statutory or charter provisions usually provide for the place of meeting, but in the absence of restrictions there found meetings held elsewhere than at the principal place of business of the corporation, or in the State where the corporation is created, will be legal, and action taken at such meeting binding. It is a common rule of law applying to all representative bodies, that action taken, to be valid, must be had at a meeting of the body in its representative and legal capacity. This rule also applies to meetings of the board of directors. They must meet as a board and transact business in their official capacity before it will be binding upon the corporation or others.

Directors, as a rule, have no implied power to fill vacancies in their number, and their proceedings, meetings, and powers are controlled and regulated by charter provisions and the by-laws adopted by the corporation.

§ 124. Powers and Qualifications. The scope of the power and authority, not only of the board of directors, but also of the officers and agents of the corporation in general, is determined by the objects for which the corporation was created. A corporation is an artificial person and is, necessarily, represented by natural persons acting as its agents on its behalf as their principal. To determine the general scope of their authority, the sources of power of a corporation may be enumerated: the charter of the corporation, including constitutional provisions, general laws relating to a particular class of corporations and the

articles of incorporation; its by-laws; the conduct of the corporation, as evidenced by some special custom followed in the transaction of its business and not contrary to the preceding, or some general business custom or usage adopted by the corporation in the management of its affairs upon which the public acts and of which the courts take judicial notice.

In the general management of the corporate business, and for the purpose of carrying out its legitimate purposes, corporate officers and agents have all the necessary and incidental powers which are fit and appropriate for accomplishing that end. Their authority need not be, in all cases, expressly conferred, but may be implied. All acts within the apparent scope of their power are binding upon the corporation, although it is not bound by an agent's misrepresentation of his authority where the person with whom he is dealing can ascertain, upon reasonable investigation, or where he has actual notice or knowledge of, the actual extent of the agent's authority. The acts of an agent of a corporation, using the term in its comprehensive sense, will be binding upon the corporation, to state the doctrine in another way, when it has clothed him with the apparent authority to do the act; or where it has allowed him, through negligence, to be clothed with the appearance of power. The apparent scope of power and authority, however, extends merely to the supervision and the management of the company's ordinary and regular business. Directors or agents have no implied power to effect a material and permanent alteration of the business or charter of the corporation, increase its capital stock nor sell the corporate property and close out its business. These rights belong, exclusively, to the stockholders or members of the corporation, and express authority must be conferred by them upon the directors to do these acts or others of a similar nature.

Directors are usually required to be also stockholders in the corporation, and other qualifications may be prescribed by the charter or by-laws.

§ 125. Unauthorized Acts, How Ratified. The unauthorized acts of an officer or an agent of a corporation may be ratified by it through acquiescence in the act, by an acceptance of the benefits resulting from its performance, or by a subsequent and formal ratification of it through the conference of express authority. Or, as has been sometimes stated, an unauthorized act may be ratified on the part of the principal by habitual action, recognition or adoption.

§ 126. Delegation of Authority. To the board of directors is entrusted by the stockholders the immediate power of transacting the business of the corporation, and at common law their powers were co-extensive with the corporation. To what extent the law permits a delegation of these powers can be briefly stated. The character of their duties in respect to the exercise of the powers conferred may be designated as discretionary and merely ministerial or mechanical. The principle usually obtains that a board of directors cannot delegate to subordinate agents the performance of their duties of a discretionary character. They must determine the general policy to be adopted by the corporation in the management of its business and exercise personally and in good faith their own best business judgment in directing the affairs of the corporation. They cannot delegate to others, for illustration, the power of declaring dividends or the duty of making calls on subscribers to the stock. On the other hand duties of a ministerial or mechanical character may be delegated by them to subordinate agents or sub-committees. The appointment of agents, the transaction of ordinary routine business, the execution of a deed or of a note, the preparation of reports required by law and the keeping of necessary records are illustrations of acts which may be properly delegated by them to others. There are some authorities, however, which hold that a board of directors may delegate the performance of some of their discretionary powers to an executive committee selected by them from among their number.

§ 127. Relation of Officers and Agents to Corporation.

The general rule obtains that the officers and agents of a corporation sustain to it and the stockholders a fiduciary or trust relation. The words trust relation are not, however, used in the technical sense. They are not, strictly speaking, trustees, but merely agents who bear to the corporation, their principal, a relation of trust and confidence.

In a Pennsylvania case,² Judge Sharswood said:

“It is by no means a well settled point what is the precise relation which directors sustain to stockholders. They are, undoubtedly, said in some authorities to be trustees, but that, as I apprehend, is only in a general sense, as we term an agent or any other bailee entrusted with the care and management of the property of another.”

Some of the authorities hold that the trust relation, using the term in the sense above indicated, is sustained by the officers and directors of the corporation, not only towards the corporation and its members, but also to the corporate creditors.

Corporate Contracts as Affected by above Relation. It follows, from the doctrine as stated in the preceding paragraph, that the contracts and other acts of the corporate officers on behalf of the corporation and with themselves will be closely scrutinized by the courts, and while not void are universally regarded as voidable, even though the act may result in a benefit or advantage to the corporation. The principle or rule of law, which controls not only officers and agents of a corporation but others occupying a fiduciary or trust relation in dealing with the *cestui que trust*, was well stated in an early case in the Supreme Court of the United States,³ where the court said, in an opinion by Mr. Justice Wayne:

“The general rule stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integ-

² *Spring's Appeal*, 71 Penn. St. 11.

³ *Michoud et al. v. Girod et al.*, 4 How. U. S. 553.

ity. It restrains all agents, public and private. But the value of the prohibition is most felt, and its application is more frequent, in the private relations in which the vendor and purchaser may stand towards each other. The disability to purchase is a consequence of that relation between them which imposes on the one a duty to protect the interest of the other, from the faithful discharge of which duty his own personal interest may withdraw him. In this conflict of interest the law wisely interposes. It acts not on the possibility that, in some cases, the sense of that duty may prevail over the motives of self-interest, but it provides against the probability in many cases, and the danger in all cases, that the dictates of self-interest will exercise a predominant influence and supersede that of duty."

The principle applicable was stated in another and controlling authority that no man can serve two masters. In a Wisconsin case,⁴ the court said:

"The idea that the same persons can constitute different identities of themselves by being called directors or officers of the corporation, so that as directors or officers they can private persons, is a violation of common sense."

Acts Merely Voidable. Although the courts adhere, convey or mortgage to or contract with themselves as without variation, to the general principle stated above, yet the facts in each case will determine whether the act of the corporate officers and agents is void or merely voidable. Although the general rule prohibits an officer or director of a corporation from contracting in his official capacity for the corporation with himself in his personal capacity, the act or contract may be accepted by the corporation and the transaction sustained. The Supreme Court of the United States⁵ said:

"It can not be maintained that any rule forbids one director among several from lending money to the corporation when the money is needed and the transaction is open and free from blame. No adjudged case has gone so far as this.

⁴ Haywood v. Lumber Co., 64 Wis. 639.

⁵ Twin Lick, etc., Co. v. Marbury, 91 U. S. 587.

Such a doctrine, while it would afford little protection to the corporation against actual fraud and oppression, would deprive it of the aid of those most interested in giving aid judiciously and best qualified to judge of the necessity of that aid and of the extent to which it may be safely given."

A contract between a corporation and one of its officers or directors which is open and free from fraud and resulting in a benefit or advantage to the corporation, when sanctioned by a majority of the board of directors, exclusive of the one with whom the contract is made, is generally held binding upon the corporation. Where the validity of an act is questioned, under the principles suggested in this and the preceding section, the burden of proof is upon the offending director or officer to show, not only that there was no resulting injury to the corporation, but also the absolute good faith of the transaction. The general rule is applied and can be taken advantage of by a stockholder in those cases where secret profits have been obtained by reason of contracts made by the directors on behalf of the corporation with themselves.

§ 128. Powers of Officers in General. The officers of a corporation are legally its agents and represent it in the transaction of its business. In general, their power and authority is derived from and limited by the sources indicated in section 124. In respect to individual officers or agents, their power and authority is further limited by the nature of the office the duties of which they are performing. The title of the office indicates the character and extent of their powers. The president, for illustration, of the corporation, is its legal and executive head, and the title of that office clearly gives notice to the world of the extent and character of his authority. This will be limited again by the purpose for which the corporation is organized. The duties and the consequent power and apparent authority of the president of a bank would be, in respect to many acts, clearly distinct and different from those of the president of a railway company or a mining company, or a corporation organized for manufacturing or other pur-

poses. The titles given to other officials of a corporation: secretary, treasurer, cashier, general counsel, superintendent, general manager, and others, in each instance convey the extent and nature of their powers and their consequent authority to bind the corporation in the transaction of its business.

The authority of all officers or agents of a corporation to act for and in its behalf may be limited by the by-laws of the corporation. The extent to which restrictive by-laws affect the rights of third parties dealing with the corporation, without notice or knowledge of them, has been considered. The general rule, it may be repeated, obtains that where the officer or agent acts within the apparent scope of his power and authority, limiting by-laws will not relieve the corporation from the consequent results of its agent's acts.

§ 129. De Facto Officers. A *de facto* officer is one who has the reputation of being, and yet is not, a real officer in point of law. His acts, however, are binding upon the corporation when those of the *de jure* officer would have the same result, and the courts adhere to this principle upon the ground of public policy and also of estoppel.

§ 130. Personal Liability to the Corporation of Officers and Agents. The acts of the corporate officers and agents, including directors or managing officers, for and on behalf of the corporation and in its name, necessarily affect the business of the corporation. The value of its property may be impaired or destroyed as a result, or the corporation may become insolvent, in extreme cases, as a result of these acts. Large losses may occur directly attributable to the act of the corporate agent. The question, then, may arise of the personal liability of the agent responsible, to the stockholders of the corporation for the results of his act. This will be determined by a consideration, again, of the nature of the duty which the corporate officer or agent owes to the corporation in the transaction of its business. In respect to the performance of discretionary matters, the common rule obtains, that they are not respon-

sible for losses occurring because of mistakes of judgment. Neither are they liable in the performance of so-called ministerial duties for anything else than gross negligence or for fraud. In other words, the courts have held that corporate officers and agents, so long as they perform the duties devolving upon them and exercise the powers of the corporation in its behalf, in good faith, with honesty and to the best of their business ability, judgment, and discretion, will not be liable for the results of their acts, however disastrous they may be. This rule is especially true of those officers or agents serving without pay. A liability, however, may be created by statute in respect to the negligence or non-performance of acts specifically required to be done.

CHAPTER XVI

FOREIGN CORPORATIONS

§ 131. Definition: The Corporate Domicil. By a foreign corporation is understood one which is created by or under the laws of another State or country, and the subject of the right of these corporations to transact business elsewhere than in the State of their creation, and the power of other States to regulate them, is one of vast importance, since there is scarcely a single corporation that does not extend its business, not only to other States, but to foreign countries.

In an early case in the Supreme Court of the United States,¹ the court in an elaborate opinion by Chief Justice Taney held that a corporation can have no legal existence out of the boundaries of the sovereignty by which it was created. It exists only in contemplation of law and by force of the law; and where that law ceases to operate and is no longer obligatory the corporation can have no existence. It must dwell in the place of its creation and cannot migrate to another sovereignty. The domicil of a corporation is, therefore, indisputably in the State of its creation, but it may, under the doctrine of comity (to be stated hereafter) acquire for certain purposes a domicil in other States. It has also been established that a corporation is not a "citizen" within the meaning of that provision of the Federal Constitution granting to citizens of one State the same privileges and immunities enjoyed by citizens of other States.

§ 132. Doctrine of Comity. In the *Bank of Augusta v. Earle* case above cited, it was further held by the court that although a corporation must live and have its being only in the State of its creation, yet it would not follow that its

¹ *Bank of Augusta v. Earle*, 13 Peters 519.

existence could not be recognized in other places, and the fact of its domicile and residence in one State created no insuperable objection to its power of contracting in another, and while it was a mere artificial being, invisible and intangible, yet it was a person for certain purposes in contemplation of law, and that its existence as an artificial person in the State of its creation could be acknowledged and recognized by the law of the nation where the dealing takes place and that it could be permitted by the laws of that place to exercise there the powers with which it was endowed by the charter of its creation. This is, in brief, a statement of the principle or doctrine of comity as applied to corporations. It has been adopted substantially by all the States in the Union, as well as other civilized nations, and it is held to be no impeachment of foreign sovereignty. The adoption of the principle contributes so largely to promote justice between individuals and to produce friendly intercourse between the sovereignties to which they belong, that courts of justice continually act upon it as a part of the voluntary law of nations.

§ 133. Power Of. The doctrine of comity enables a foreign corporation to transact business elsewhere than in the State of its creation, and the question naturally arises as to the extent of its powers when so acting. Judge Story said, upon this question:²

“The power of a corporation to act in a foreign country depends both upon the law of the country where it was created and on the law of the country where it assumes to act. It has only such powers as were given to it by the authority which created it. It cannot do any act by virtue of those powers in any country where the law forbids it so to act. It follows that every country may impose restrictions and conditions upon foreign corporations which transact business within its limits.”

The power, therefore, of a foreign corporation to act outside of the limits of the State creating it is determined in the first instance by the extent of the powers granted by its

² Conflict of Laws, § 106, Note A.

corporate charter and the general law of the corporate domicile and the construction, interpretation and application of the general law of corporations which follows. It is also limited, when acting in a foreign State, by express statutory provisions adopted by that State regulating or limiting the transaction of business by a foreign corporation and by the general public policy of the local sovereign in respect to all corporations, not expressed through specific legislative acts. Ordinarily, a corporation, under the doctrine of comity, is clothed everywhere with the character and powers given by its charter, and its capacity to make contracts elsewhere than in the State of its creation is supported by uniform and long continued practice. While it is true that corporation must "dwell in the place of its creation and cannot migrate to another sovereignty", it may transact business and do such acts in foreign jurisdictions as a natural person might do subject to the limitations and regulations imposed by the sovereign State. In stating the exact extent of the power of a foreign corporation to transact business, a legal author has said:³

"The recognition which is by comity extended to foreign corporations does not vest them with an unrestricted faculty of extra-territorial action, even within the limits of their charter powers; while the cases are not uniform on this point, yet the weight of authority seems to be that the company's power in the foreign jurisdiction extends only to those acts which may be done through the mediation of agents. Those corporate acts which must be done by the company itself through the persons of the corporators or stockholders, must be performed where the company has a legal existence. The most obvious of these are meetings for the acceptance of the charter and the organization of the corporation."

§ 134. Right of State to Exclude or Regulate. While the doctrine of comity, viz, the recognition of the laws of a foreign jurisdiction, is universally adopted, yet such recognition is not obligatory. It follows, necessarily, that the foreign state may, as a matter of theory, exclude entirely

³ Murfree on Foreign Corporations, § 8.

the foreign corporation from transacting business within its limits, or it may adopt such regulations controlling them in the transaction of business within the State as it may elect. The foreign corporation has no absolute right of recognition in another State. It depends for a recognition of its corporate existence, or the enforcement of its contracts, entirely upon the assent of that State. The foreign jurisdiction may restrict the business of a foreign corporation to particular localities, or they may require such security for the performance of its contracts with their citizens as the foreign State deems best for their protection. In respect to the expediency and advisability of regulative measures by foreign jurisdictions, the Supreme Court of the United States⁴ held:

“It is not every corporation lawful in the State of its creation that other States may be willing to admit within its jurisdiction or consent that it have officers in them, such as, for example, a corporation for lotteries, and even when the business of a foreign corporation is not unlawful in other States, the latter may wish to limit the number of such corporations or subject their business to such control as would be in accordance with the policy governing domestic corporations of a similar character.”

Limitations Upon Right to Exclude or Regulate. The Constitution of the United States, in respect to the matters designated in it, is the paramount and controlling law of the United States, and establishes the rights of all persons and citizens within the limits of its operative effect. To the Federal government, by the Constitution, is given the right to regulate interstate commerce, and the courts have held that regulative provisions as to foreign corporations, passed by the different States, may operate as a regulation of interstate commerce, and therefore be unconstitutional. Provisions for the taxation of foreign corporations have notably fallen within the application of this constitutional grant. In a leading case⁵ the Supreme Court of the United

⁴ *Pembina Mining Co. v. Penn.*, 125 U. S. 181.

⁵ *Paul v. Virginia*, 8 Wallace 108.

States held that the business of insurance was not interstate commerce, with the consequent result that many laws passed by the different States relative to and regulating the writing of insurance policies by foreign corporations are considered valid unless for other reasons void. The constitutional provision in respect to the abridgment of the privileges or immunities of citizens of the United States has also been invoked, and the uniform holding here is that a corporation is not a citizen within the meaning of the term there used. But it has been held that they are persons within the meaning of the fourteenth amendment, which denies to a State the right to deprive any person of life, liberty, or property, without due process of law, or to deny to any person the equal protection of the laws. The protection of the Federal Constitution has also been invoked in respect to the business carried on by foreign corporations owning and manufacturing articles protected by patents, the sole power to grant which, it will be remembered, rests in the Federal Government. But the courts have held on this point that foreign corporations are not entitled to transact their business in foreign states free from regulative measures.

§ 135. Conditions Imposed. The conditions and regulations imposed by the different States upon foreign corporations desirous of transacting business within their limits are many and differ widely in number and character. Of necessity, the reader is referred to an examination of the laws of each State to determine particular questions involved. It can be said that in main the objects of such regulation are, first, to bring the person of the foreign corporation within the jurisdiction of the courts of the State for the purpose of serving process and enabling citizens of the State to maintain actions in the local courts growing out of their business transactions with foreign corporations; and, second, to afford information of the extent, character, and nature of the powers of the corporation to enable persons dealing with them to act intelligently and with knowledge of their corporate powers.

As illustration of the provisions of the first class might be noted: the appointment of an agent to receive process; a requirement that the corporation shall establish and maintain a known place of business; the waiving of the right granted by the Federal statutes to remove actions from local to Federal courts, and others of a similar character.

Provisions coming under the second class are those requiring the filing of a copy of the charter of the corporation with a designated officer, and, in some instances, the by-laws of the corporation. These regulative provisions and requirements apply only to foreign corporations doing business within the State, and coming within the operation of a specific law. A definition of the phrase "doing business" will be given later.

Waiver of Right to Remove. It is a common condition imposed by a State upon foreign corporations, that before one can acquire the right to transact business within its borders it must waive its right to invoke the jurisdiction of the Federal courts in cases arising out of business transactions within the State. Under the Federal statutes residents and citizens of different States have the right to remove an action brought in a State or local court to the Federal courts on the grounds, among others, of diversity of citizenship. To illustrate, an action, if service of process can be obtained, against a foreign corporation, may be brought by a plaintiff, a resident and citizen of a State in its local courts, against a foreign corporation, a resident and citizen of another State. Under the Federal statutes, and acting within the time designated, the defendant, on account of the diversity of citizenship, would be entitled to remove the case from the State to the Federal court. This right of removal is deemed of great advantage, since the trial of the cause is taken from a local court and jury, likely to be, in many cases, affected by local prejudices and sympathies, to a court not affected by these conditions. On the other hand, the plaintiff may be subjected to more expense in the trial of his cause of action by the removal of

the place of trial to a distance from his residence. Whatever the reasons, the rights of the respective parties have been deemed of material and substantial advantage, and, as already stated, the condition requiring a waiver of the right to remove is one frequently found in the laws of the different States. In respect to the validity of such conditions, there is, naturally, a conflict of decision between the State and the Federal courts, the State courts holding to the validity of such conditions, proceeding upon the reason that since it is only by an adoption of the doctrine of comity that a foreign corporation is permitted to transact any business outside the State of its creation, clearly the State has a right to admit it upon such terms as it may elect to impose. On the other hand, the Federal courts maintain, that in respect to the right of removal the Constitution and laws of the United States are the paramount law, and grant to all citizens and persons within the jurisdiction of the United States the right to have actions, in designated cases, tried by the Federal courts; that waiver of the right will not be binding upon them, and that no State can pass a law which will deprive them of this constitutional privilege and right. The Supreme Court of the United States has repeatedly announced the latter doctrine, while decisions of State courts in general adhere to the legality of this particular condition.

On the question of the right to remove a particular case the decisions of the Federal courts are, undisputably, the controlling authority, and the foreign corporation will be entitled, as a matter of constitutional right, to have the case removed. The State, however, if it so elect, may, because of the non-compliance by the foreign corporation with the condition imposed, viz, the waiver of the right to remove, revoke the license of the foreign corporation enabling it to transact business within the limits of the foreign State and prohibit it from a further transaction of its business there.

Failure to Comply with Conditions. The material question involved is the effect of a failure to comply with condi-

tions imposed upon foreign corporations and which, by the laws of the State, must be complied with before it can have the legal right to transact business within the borders of the foreign jurisdiction. Transactions of a contractual nature comprise the vast majority of the acts of foreign corporations. The general rule seems to be that in the absence of express statutory provisions the contract or the act of a foreign corporation, where stated conditions have not been complied with, are not necessarily illegal and void, but merely voidable. A State may, however, by statute declare results to follow a failure to comply with imposed conditions. The decisions are conflicting, and in the absence of a specific statutory effect they can be roughly grouped into four classes: First, the decisions which hold that foreign corporations can not recover on contracts entered into by them where there has been a failure on their part to comply with statutory provisions relative to the legal transaction of business within the foreign jurisdiction; second, the contracts of foreign corporations are considered as void from the standpoint of the foreign corporation, but not from that of the citizen of the State, who may recover; or, stated differently, the contract is enforceable by the citizen of the State, not by the foreign corporation. This line of decisions, clearly, is not sound. The principle of estoppel should apply equally to both parties to the transaction. Third, a line of cases based in some instances upon express statutory provisions, that failure to comply with conditions merely suspends the right of the foreign corporation to use the remedies and courts afforded by the State to litigants; and, fourth, those decisions, entirely based on statutory provisions, holding to the enforcement of the specific penalty fixed by law for a failure to comply with conditions imposed.

§ 136. Right to Sue. The right of a foreign corporation to bring an action for the enforcement of its rights in a foreign state rests entirely upon the principle or doctrine of comity. The right of action is accorded universally, and the doctrine of comity in this respect has been recognized

from the earliest known times. In some States the limitation exists that a foreign corporation cannot prosecute an action in the courts of that State arising out of some act contrary to law or the policy of the State, or which is forbidden by the laws of the State to be done by a domestic corporation.

§ 137. **Actions Against.** The question of jurisdiction is the primary and essential one under the subject of this section. In many States this is solved by the requirement that, as one of the conditions for the transaction of business within the State, the foreign corporation must appoint or designate an agent or representative upon whom service can be had. The fundamental principle exists and is universally followed that a corporation, the same as a natural person, cannot be sued in an action *in personam* in a State within whose limits it has never been found. The person of a foreign corporation may be, for purposes of jurisdiction, brought within a State other than that of its creation through the appointment, as above suggested, of an agent who stands for and represents the corporation for the purposes specified. Or, it may agree with the State that its person can be regarded as being within the jurisdiction of the State; or, it may agree with the opposite party and appear and defend without raising the question of jurisdiction. Before an action can be maintained and a legal judgment entered against a foreign corporation, its legal person must have been served with process. Where a particular form of service is provided by statute, it is usually regarded as exclusive. Foreign corporations are not domesticated by service of process upon them. Where the foreign corporation complies with the statutory provisions and appoints an agent upon whom service of process can be had, the courts hold that the jurisdiction thus acquired is complete.

Service of Process. The rendition of a legal judgment *in personam* against a foreign corporation is based upon the presence of the person of the corporation within the State. The foreign corporation must be doing business

within the State before any law regulating its business or providing for service of process will be applicable. If service of process is required to be made upon a designated agent of a corporation, compliance with statute will not, *ipso facto*, constitute service upon the corporation. The corporation must be doing business within the State in order to justify service of process against it on its agent. As service of process goes to the jurisdiction of the court over the person, it must be so construed as to conform to the principles of natural justice and so that it will constitute "due process of law". To do this the agent must be one having in fact a representative capacity and derivative authority. The agent must be one actually appointed and representing the corporation as a matter of fact, and not one created by construction or implication contrary to the intention of the parties. The name given to the agent is not controlling. The actual relations of the parties determine his capacity; and, further, the corporation must be doing business in the State and the agent must be transacting the business. The cases all hold that the person served must be an agent of such capacity and authority that in law his presence is the presence of the foreign corporation within the State, and that in law he is, by substitution, the corporation itself. The two questions involved in the service of process upon a foreign corporation are, therefore, first, whether the foreign corporation is doing business within the State; and, second, whether the person served is an agent of sufficient capacity. Otherwise there would be no limit to the right of the State to establish arbitrary rules in regard to service on foreign corporations.

In a leading case in the Supreme Court of the United States,⁶ the court said:

"We are of the opinion that when service is made within the State upon an agent of a foreign corporation, it is essential, in order to support the jurisdiction of the court to render a personal judgment, that it should appear somewhere on the record, either in the application for the writ

⁶ St. Clair v. Cox, 100 U. S. 530.

or accompanying its service, or in the pleadings or the findings of the court, that the corporation was engaged in business in the State. The transaction of business by the corporation in the State, general or special, appearing, a certificate of service by the proper officer upon a person who is its agent there, would, in our opinion, be sufficient *prima facie* evidence that the agent represented the company in the business. It would then be open, when the record is offered in evidence in another State, to show that the agent stood in no representative character to the company; that his duties were limited to those of a subordinate employe, or to a particular transaction, or that his agency had ceased when the matter in suit arose."

As the service of process involves the constitutional question of due process of law, it is a Federal question, and the decisions of the Federal courts, both in respect to the character or capacity of the agent upon whom process is served, and whether the corporation is doing business, are binding upon the State in construing statutes relative to service on foreign corporations.

Definition of "Doing Business". One of the conditions necessary to obtaining jurisdiction against foreign corporations or the application of laws regulating the transaction of their business, is that it must be "doing business" within the foreign State. This is a question which must be, necessarily, determined by the facts in each particular case, and there are many decisions discussing the question. In one case,⁷ the court said:

"A corporation may be servable in a State other than that in which it is organized and incorporated. It must have engaged in business to the extent that it may be said, in legal parlance, to be doing business therein, and the agent served therein must be its authorized representative for the transaction of such business or such as will be deemed generally to represent the company in its corporate capacity."

The act involved in this case was an isolated one, done in connection with a pending law suit, and the court then said:

⁷ *Ladd Metals Co. v. American Mining Co.*, 152 Federal 1008.

"But this cannot be considered as doing business here any more than if the defendant had waived the matter of jurisdiction and come into this court to make a defense to the present suit. This also is only a single transaction within itself, and it has nothing to do with the ordinary business of the company. Such a transaction lacks all the features of what is legally denominated doing business with a view of carrying on the business for which the organization was organized and incorporated."

In another case,⁸ the court said:

"The question then remains, is the respondent doing business within this State? It seems clear to us that it is not. It is not easy to formulate a general rule by which it can be determined in all cases whether or not a corporation is doing business at a particular place; but it seems to be the consensus of opinion that a corporation, to be within the rule, must transact within the State some substantial part of its ordinary business, continuous in the sense that it is distinguished from merely casual or occasional transactions, and it must be of such a character as will give rise to some form of legal obligation. . . . Merely advertising its business in a State is not doing business within such State."

The question is best illustrated by reference to some concrete cases. The courts have held that the following acts do not constitute doing business within the State by a foreign corporation; an isolated transaction without the intention of continuing business; the single purchase of an article of machinery; soliciting subscriptions to a newspaper published in a foreign state; the sale of goods by traveling salesmen; the frequent purchases of material within a state; the maintenance within a state of an office occupied by persons engaged in advertising and soliciting business for a foreign corporation.

⁸ *Gaudie v. Northern Lumber Co.*, 74 Pac. Rep. 1008; see also *North Wis. Cattle Co. v. Oregon Short Line R. R. Co.*, 105 Minn. 198.

CHAPTER XVII

DISSOLUTION AND INSOLVENCY

§ 138. **Dissolution: How Effected.** The dissolution of a corporation has been defined "as that condition of law and fact which ends the capacity of the body corporate to act as such and necessitates a final liquidation and extinguishment of all the legal relations subsisting in respect to the corporate enterprise." According to the common law and the older textbook writers, a dissolution could be effected in four ways: *First*, by an act of the legislature under a reserved power to repeal; *second*, by death of all its members; *third*, by a forfeiture of the charter; *fourth*, by the surrender of the charter. And to these may be added: *fifth*, by the expiration of the statutory period of its existence; and *sixth*, a compliance with statutory requirements providing for a voluntary dissolution. The manner of and conditions affecting a dissolution, under the circumstances above noted, may be briefly considered.

By Act of Legislature. A corporation may be dissolved by an act of the legislature for a misuse or nonuse of its charter or for any other good and sufficient reason if this power be reserved to the State in the original grant. Where the power to repeal does not exist, the doctrine of the Dartmouth College case obtains in all its force, and no action can be taken by a legislative body dissolving the corporation.

By Death of All Its Members. A dissolution of a corporation can be effected for this cause only in the case of non-stock corporations. It is impossible where a corporation has capital stock, for upon the death of a member his interest passes to his representative, as provided by law.

By Forfeiture of Charter. The grant of the corporate charter is always subject to the implied condition that the

powers and privileges therein granted will not be abused, but courts are generally reluctant to decree a forfeiture of a corporate charter. The act of the corporation upon which is based a proceeding brought by the State for this purpose must be one grave and serious in its character and which directly affects the rights and interests of the public. "The public must have an interest in the acts done or omitted to be done. If it is confined exclusively to the corporation and in no wise affects the community, it should not be considered as of those conditions upon which the grant is made."⁹ There must be a clear and wilful abuse or misuse of the powers and franchises of the corporation. The question cannot be raised except in a direct proceeding by the State, since it is the State alone which grants the corporate powers and franchises.

By Surrender of Charter. All the stockholders of the corporation, acting in their corporate capacity, can elect to voluntarily surrender the charter of the corporation and if accepted by the State a dissolution will take place. There must be a formal, solemn act of the corporation, before this can be done.

By Expiration of Corporate Life as Fixed in Charter. The corporation may be also dissolved by the expiration of the time fixed in its charter for its corporate existence. Many of the older corporations were organized with a perpetual charter in the true sense of that word, but for many years it has been customary for States, by statutory provision, to fix a definite period for which corporations could be organized, exist, and transact their business in a corporate capacity. Usually, the expiration of the charter period terminates *ipso facto* the life of the corporation, although in some States, by express provision of law, a *de facto* corporation exists for a designated time for the purpose of winding up the affairs of the corporation, liquidating its debts and distributing its property.

Statutory Methods for Dissolution. The different States now, quite generally, by statute, provide methods for the

⁹ Harris v. Ry. Co., 51 Miss. 602.

dissolution and winding up of corporations. This may be done either at the instance of the stockholders or of the State. To legally effect a dissolution in this manner, the parties must act as provided by law.

§ 139. Effect of Dissolution. Under the common law the effect of a dissolution was to put an end to the corporate existence for all purposes and destroy its power to act in a corporate capacity. Thereafter, it was held it could neither institute nor defend a suit; make nor take a contract. All its debts and claims were extinguished and all actions by or against it were abated. Under the present rulings of the courts, and by statutory provisions in many cases, the severity of the rule above stated has been materially modified for the purpose of protecting the property of the corporation and the rights of its creditors. While, after dissolution, in the absence of express statutory provisions, it cannot exercise corporate powers, yet its property and property rights are not destroyed. Its rights of action remain, but the remedies are merely changed. The property of the corporation and its rights will be taken in charge by a court of equity; or, if the statutes so provide, by the person therein designated, and managed as a trust fund for the benefit of creditors and of the stockholders. Under these circumstances the closing out of the affairs of the corporation must be as speedily accomplished as possible with the best interests of its creditors and stockholders in view. The obligations of contracts survive, except such as are incapable of specific performance, and the creditor may enforce his claims against the property of the corporation. Executory contracts, as a rule, cannot be carried out. In many cases it has been held that one contracting with a corporation acts upon the implied assumption, in all cases, that its corporate life may be terminated before the contract will be fully performed, and is, therefore, entitled to no further rights under it nor a claim for damages on account of the failure on the part of the corporation to fully perform. This rule, however, does not apply to the voluntary dissolution of a corporation,

for it cannot, by its own acts, relieve itself of its contracts and their obligations.

§ 140. Corporate Insolvency. The insolvency of a corporation does not affect its legal existence, as the possession of property is not necessary to corporate life. Statutory provisions exist in all States providing, in cases of insolvency, for the appointment of a receiver to take charge of the business and property of the corporation for the benefit of its creditors. These provisions are so numerous and involved that no special reference can be made to them that will be of assistance, but, on the contrary, might be confusing. The appointment of a receiver is one of the inherent original functions of a court of equity. The power to appoint a receiver is discretionary with the court, but when done, that officer is regarded as an arm of the court and considered as acting for and on behalf of the court. His possession of the property is held to be possession by the court and interference with it will not be tolerated.

§ 141. Receiver. Powers Of. The rights of a receiver of an insolvent corporation are generally limited by the order of appointment. Where this is general in its nature, the receiver is vested with ample authority to conduct the business of the corporation, having in view the speedy adjustment of its obligations. He can originate proceedings looking to the enforcement of the rights of the corporation; employ counsel; make contracts for a limited time in the conduct of the business; purchase property where necessary to carry on its business; compromise claims; and, in general, do all necessary acts in furtherance of the specific objects and purposes for which he was appointed. He is entitled, in the performance of his duties, to the protection of the court, and can, as a matter of right, apply to it for instructions when he deems it advisable.

Duties Of. The duties of a receiver are to obey the orders of the court; to exercise in good faith the powers vested in him by the order of appointment; to be impartial in the performance of those duties and to preserve the property of the corporation.

Liabilities Of. He may be personally liable for using or converting the property of the estate; for his personal dishonesty or misconduct in the management of its affairs; in the personal purchase by him of property of the estate; and he is also liable as representing the estate on contracts in force at the time of the appointment remaining partially unexecuted.

Priority of Claims Against Estate or Receiver. Upon the insolvency of the corporation and the appointment of the receiver, the statutes may prescribe the manner and persons to whom the property of the corporation, as it is disposed of, may be distributed. If no statutory provisions exist in respect to preferred creditors, the court, in its orders from time to time, may establish such priorities or preferences as will accord with established rules and principles of equity. Where an insolvent corporation is, at the time of the insolvency, a going concern, the court usually directs to be paid the claims of those rendering services or furnishing the supplies that enabled it to continue its business. The debts of the receiver contracted by him under express orders of the court, or under his general authority, have, as a rule, priority of payment.

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